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Thursday
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Part III

Office of Personnel Management

Management Rights, Consultation and
Scope of Bargaining Policy in Labor-
Management Relations

**OFFICE OF PERSONNEL
MANAGEMENT****Management Rights, Consultation and
Scope of Bargaining Policy in Labor-
Management Relations**

AGENCY: Office of Personnel
Management.

ACTION: Notice.

SUMMARY: This notice announces the Office of Personnel Management's intention to publish a Federal Personnel Manual (FPM) issuance on management rights, consultation and scope of bargaining policy in labor-management relations. On March 30, 1983, OPM published a notice in the *Federal Register* of its intent to publish such an issuance along with the text of the proposed issuance and requested by May 31, 1983, the comments of public employee organizations and other interested parties in the Federal community and the general public. Based on the numerous comments submitted, OPM is publishing a new draft issuance for comment by public employee organizations, other interested parties in the Federal community and the general public.

OPM has attempted to stress in the new draft that: (a) The issuance is policy guidance for agency management representatives and is not a regulation, (b) that agencies should fully recognize their obligation to bargain and should carefully, and in good faith, consider all serious proposals presented in negotiations, and (c) that the information and guidance in the issuance should be applied with judgment and with due regard to appropriate case law and any special provisions affecting a particular agency's labor relations program. The categories of nonnegotiable matters have been refined and, where the negotiability of specific matters is discussed, the specific statutory, regulatory or case law citations are noted. The section describing constructive consultation has been revised to distinguish it from National Consultation Rights as described in 5 U.S.C. 7113(b) and to clarify that it intended as an adjunct or supplement to formal collective bargaining, not a replacement or circumvention of it.

Some commentators alleged that OPM has no authority to issue this policy statement for agency management representatives on labor-management relations and that only the Federal Labor Relations Authority (FLRA) may issue labor-management policy. This

allegation runs counter to the stated basis for the reform of the federal labor-management relations system in the Civil Service Reform Act. 5 U.S.C. 7135(b) provides that policies, regulations and procedures established under Executive Orders, including E.O. 11491, as amended, in effect on the effective date of CSRA shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of the Act. Executive Order 11491, as amended, was in effect at the time CSRA took effect, and Section 25(a) of the Order, which provides that the Civil Service Commission shall maintain a program for policy guidance to agencies on labor-management relations, was not superseded by specific provisions of the CSRA and therefore continues in effect until revoked by the President. The continuation of section 25(a) of Executive Order 11491, as amended, was affirmed by the President when, on December 28, 1978, he issued Executive Order 12107, as part of the implementation of Reorganization Plan No. 2 of 1978. Paragraph 16 of that Order amends Section 25(a) of E.O. 11491, as amended, by substituting "Office of Personnel Management," for "Civil Service Commission," and section 2-402 specifically provides that these provisions, among others contained in E.O. 12107, shall continue in effect until modified, terminated, or suspended. As of this date, E.O. 12107 has not been modified in any way.

The continuation of OPM's function of maintaining a program of policy guidance to agencies is consistent with the Congressional purpose, in enacting the labor-management relations portion of the Civil Service Reform Act, to create the FLRA as an entity independent from the management of the various agencies on whose labor-management issues it would rule. For FLRA to provide the kind of policy guidance to agency managers which is clearly assigned to OPM would undermine and be inconsistent with the independence of the FLRA.

DATE: Comments must be received on or before August 15, 1983.

ADDRESS: Send of delivery comments to Patrick Korten, Office of Personnel Management, Office of Policy and Communications, Room 7K51, 19th and E Streets, NW., Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: Allan D. Heuerman, 202-632-6811.

SUPPLEMENTARY INFORMATION: Text of FPM Letter follows.

Donald J. Devine,

Director.

Subject: Manager Rights Consultation and Scope of Bargaining Policy in Labor-Management Relations

a. Background. Since the enactment of the Civil Service Reform Act (CSRA), the Office of Personnel Management has been monitoring the impact of the Federal labor-management relations program on the effective and efficient management of the Government. OPM carefully studies the decisions of the Federal Labor Relations Authority (FLRA), the Federal Service Impasses Panel (FSIP), and the courts, as well as the provisions of negotiated agreements. This on-going process has indicated an immediate need to provide information and policy guidance to agency management representatives about the extent to which various issues are, or should be, subject to labor-management negotiations.

b. Purpose. The purpose of this letter is to state OPM policy on management rights, consultation and the scope of bargaining under the Federal Service Labor-Management Relations Statute (Title VII of CSRA) in order to more effectively meet the mandate of Congress that management rights be faithfully protected and that collective bargaining be conducted in a manner consistent with the requirement of an effective and efficient Government. In addition to stating OPM policy, the letter summarizes and reiterates those matters that have been placed outside the scope of bargaining by statute, Government-wide and agency regulations, and decisions of the Federal Labor Relations Authority and the courts.

In addition, it is hoped that a greater focus can be placed in the future on constructive consultation, where the absence of the formal, confrontational atmosphere, which usually prevail in collective bargaining situations, may facilitate more meaningful involvement by employee organizations. Prompted by a mutual desire of both labor and management to make American industry more efficient and productive, labor-management relations in the private have increasingly focused on such matters as productivity improvement. It is hoped that an equivalent opportunity exists for cooperation of this sort in the Federal government as well.

OPM considers this policy guidance as an aid to management representatives to quickly identify matters that may be of concern when presented in proposals during

negotiations. OPM stresses that agency management should carefully, and in good faith, consider all serious proposals offered in negotiations and, where appropriate, obtain technical guidance before taking a firm position on the negotiability of any proposal. Also, it should be noted that some agencies, organizational units of agencies, or categories of employees are not covered, or are only partially covered, by the Federal Labor-Management Relations Statute. Where this is the case, agency management should make appropriate interpretations and modifications as necessary. Finally, OPM cautions that this information and guidance is based on the best information available at the time of publication. Subsequent legislation, regulations and administrative and judicial decisions may affect the scope of bargaining as it is described below. OPM will periodically revise and supplement this guidance to reflect such developments.

c. Obligation to Bargain. OPM recognizes the obligation of agencies and unions to negotiate on conditions of employment within the framework established by the CSRA and other laws and regulations, including negotiations on the implementation of managerial decisions and on appropriate arrangements for employees adversely affected as prescribed in 5 U.S.C. 7106(b) (2) and (3). At the same time, OPM, agency management, and labor organizations share a responsibility to assure that personnel policies and practices facilitate and improve employee performance and the efficient accomplishment of the work of the Government. This requires agency management to ensure that its negotiators have a full understanding of, and give highest priority to, the protection of management rights in their relations with union representatives at the bargaining table. Representatives of labor organizations, for their part, have an obligation to negotiate in a manner consistent with the requirement of an effective and efficient Government. The mutual obligation to bargain does not, of course, compel either party to agree to a proposal or to make a concession (5 U.S.C. 7103(a)(12)). Bargaining over implementation procedures or arrangements should be conducted as much as is practicable at the level of managerial authority closest to the affected employees, and should never interfere with the exercise of basic management rights protected in 5 U.S.C. 7106. Neither should such bargaining ever be allowed to have a negative effect on operating efficiency or the public interest.

d. Prohibited Subjects of Bargaining:

Management Rights. The Federal labor-management relations program limits the scope of bargaining by circumscribing the negotiability of certain matters in order to preserve Congressional and Executive prerogatives and flexibility, the ultimate effect of which gives management the right to make certain decisions unilaterally. These rights are safeguarded in 5 U.S.C. 7106(a). Agency management cannot negotiate its authority: (1) To determine its mission, budget, organization, number of employees, and internal security practices; (2) to hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, or discipline its employees; (3) to assign work, contract-out work and determine the personnel by which operations shall be conducted; (4) to make selections for appointment from appropriate sources; and (5) to take necessary actions during emergencies. These restrictions cannot be waived by an agency, and if provisions of a negotiated agreement violate these restrictions, those provisions are invalid and unenforceable. The following list contains specific matters in this category that cannot be negotiated by management along with the basic statutory, regulatory or case law citations.

Determination of agency mission—5 U.S.C. 7106(a)(1);

Determination of agency budget—2 FLRA No. 77;

Determination of agency organization—8 FLRA No. 28;

Determination of number of agency employees—5 U.S.C. 7106(a)(1);

Determination of internal security practices of the agency—10 FLRA No. 74;

Hiring of employees—10 FLRA No. 74;

Assignment of employees to positions—2 FLRA No. 77;

Direction of employees—5 FLRA No. 14;

Lay-off of employees—10 FLRA No. 1;

Reduce in Grade or Pay—9 FLRA No. 142;

Other discipline of employees—9 FLRA No. 142;

Assignment of work—6 FLRA No. 106;

Contracting-out of work—6 FLRA No. 105;

Fill positions from any appropriate source (including promotion candidates)—10 FLRA No. 18;

Decision to fill positions—2 FLRA No. 33;

Percentage of vacancies to be filled—2 FLRA No. 33;

Training to be assigned during duty hours—7 FLRA No. 122;

Use of seniority as sole basis for assignment of employees to positions or duties—2 FLRA No. 77;

Establishment of qualifications for positions—11 FLRA No. 92;

Determination of critical elements of positions—3 FLRA Nos. 119 and 120;

Performance standards for positions—3 FLRA Nos. 119 and 120;

Actions in event of emergency—7 FLRA No. 52;

Use of name tags based on internal security—2 FLRA No. 109;

Employees' obligation to answer work-related questions—678 F.2d 97 (9th Cir. 1982);

Establishing conditions on the assignment of work—2 FLRA No. 98;

Selection of employees to perform work as wage-survey data collectors—7 FLRA No. 52.

This list contains most, but not necessary all, of the important matters excluded from bargaining under 5 U.S.C. 7106(a).

e. Prohibited Subjects of Bargaining: Other Matters Established or Excluded by Law. Also excluded from negotiations are matters related to prohibited political activities; the classification of any position; and matters specifically provided for by Federal statute (5 U.S.C. 7103(a)(14)). None of these restrictions can be waived by an agency, and if provisions of a negotiated agreement violate these restrictions, those provisions are invalid and unenforceable. The following list contains specific matters in this category that cannot be negotiated by management along with the basic statutory, regulatory or case law citations.

Salary (GS)—5 U.S.C. 5332(a);

Wages (FWS)—5 U.S.C. Chapter 53, Subchapter IV;

Retirement benefits and contributions—5 U.S.C. Chapter 83, Subchapter III;

Health insurance benefits and premiums—5 U.S.C. Chapter 89;

Number and designation of holidays—5 U.S.C. 6103;

Union or agency shop—1 FLRA No. 64;

Waiting period for step increase—5 U.S.C. 5335(GS); § 5343(e)(2) (FWS);

Restrictions on political activity—5 U.S.C. 7103(a)(14)(A); 5 U.S.C. Chapter 73, Subchapter III;

Criteria for disability retirement—5 U.S.C. 8337;

Choice of appeal route where choice is not provided in law—5 FLRA No. 88;

Simultaneously processing EEO complaints under negotiated and statutory procedures—5 U.S.C. 7121(d);

Classification of positions—5 U.S.C. § 7103(a)(14)(B); 5 U.S.C. Chapter 51;

Use of official time for internal union business—5 U.S.C. 7131(b);

Determination of what constitutes work—FLSA and 5 U.S.C. Chapter 55;

Granting probationary employee right to grieve dismissal—D.C. Circuit. No. 82-1822, 1983.

This list contains most, but not necessarily all, of the important matters excluded from bargaining by law.

f. *Prohibited Subjects of Bargaining: Non-discretionary Matters Prescribed by Government-wide Regulations.* Others matters are excluded from agency negotiations because they are prescribed or limited by OPM (or in Government-wide regulations of other agencies) in issuances found in the Code of Federal Regulations (CFR) or the Federal Personnel Manual (FPM). These exclusions especially involve, but are not limited to, questions or pay, retirement, health and life insurance, and other benefits set by law (5 U.S.C. 7117(a)(1)). Moreover, OPM cannot be required to negotiate on its issuances although, under 5 U.S.C. 7117(d)(1), qualified labor organizations have the right to consult with OPM on certain of its regulations. Specific matters in this category are:

Premium Pay (GS)—5 CFR Part 550, Subpart A;
Premium Pay (FWS)—5 CFR Part 532, Subpart E;
Environmental Pay—5 CFR Part 532.511;
Hazardous Duty Pay—5 CFR Part 550, Subpart I;
Length of probationary period—5 CFR Part 315, Subpart H;
Maximum amount of travel and per diem and allowance—41 CFR Part 101-7;
Time-in-grade (promotion)—5 CFR Part 300.602;

Establishment of tours of duty that would prevent changes by management in advance of the work week—5 CFR 610.121(h).

This list contains most, but not necessarily all, of the important matters excluded from bargaining by Government-wide regulations.

g. *Prohibited Subjects of Bargaining: Matters Prescribed by Agency-wide Regulations.* During the course of negotiations, proposals may be made which involve agency-wide regulations. In such instances, the agency may assert a compelling need for the regulations. Such regulations bar negotiations unless and until the Federal Labor Relations Authority (FLRA) has determined that no compelling need exists for a particular regulation (5 U.S.C. 7117(a)(3)), except that the bar to negotiations does not apply where more than a majority of the employees affected are in a single bargaining unit, a situation that has rarely been found (5 U.S.C. 7117(a)(3)). It is OPM policy that proposals which address or affect existing agency regulations should be evaluated carefully by management to assure that no negotiations bearing on agency regulations for which a

compelling need exists are permitted to commence.

h. *Permissive Subjects of Bargaining: Matters Designated as Permissive by Law.* The Statute does permit negotiations, at the election of the agency, on limited topics that would otherwise be excluded. These are: (1) The numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, and (2) the technology, methods and means of performing work (5 U.S.C. 7106(b)(1)). It is OPM policy that agencies should not elect to negotiate these matters unless the benefits to efficiency of operations to the Government far outweigh the limitations on management flexibility that may result. If negotiations have commenced on these matters, the agency is free to terminate the negotiations at any time prior to agreement being reached. Some, but not necessarily all, of the important matters in this category are:

Elimination of positions—5 U.S.C. 7106(b)(1);
Freeze on hiring—3 FLRA No. 97;
Numbers of employees or positions assigned—5 U.S.C. 7106(b)(1);
Types of employees or positions assigned—5 U.S.C. 7106(b)(1);
Grades of employees or positions assigned—5 U.S.C. 7106(b)(1);
Technology, methods, and means of performing work—5 U.S.C. 7106(b)(1);
Establishing additional shift(s) or tour(s) of duty—9 FLRA No. 15;
Transfer of positions within an agency—9 FLRA No. 108.

This list should not be regarded as including all matters to which OPM would apply this policy.

i. *Non-mandatory Subjects of Bargaining: Matters not Directly Related to Conditions of Employment of Bargaining Unit Employees.* Although the Statute does require agencies to bargain over "conditions of employment," for a union proposal to be a mandatory subject of bargaining, it must relate directly to conditions of employment of bargaining unit employees (3 FLRA No. 44). If it does not, the agency may choose not to bargain on it. It is OPM policy that agencies should not elect to negotiate on non-mandatory subjects such as:

Payroll deductions for political purposes, including political action committees—6 FLRA No. 106;
Allowing intra-subgroup bumping in a RIF in which the competitive area includes bargaining and non-bargaining unit employees—8 FLRA No. 46;
Defining competitive areas for RIF covering non-bargaining unit employees—9 FLRA No. 81;
Procedures for filing supervisory and other non-unit positions—3 FLRA No. 44.

Number of management bargaining representatives—3 FLRA No. 14. This list should not be regarded as including all matters to which OPM would apply this policy.

j. *Contested Matters: OPM Considers Nonnegotiable.* There are other matters on which FLRA's decision(s) are under challenge in court. OPM's policy is that these matters are not permissive subjects of bargaining and should be held to be nonnegotiable by agencies. Among these are:

Crediting Plans—11 FLRA No. 47;
Limiting use of part-time employees—8 FLRA No. 116;
Limitations on right to contract-out—10 FLRA No. 1.

k. *Consultation.* Some matters which may or may not be negotiable may be very appropriate for consultation. We are not describing here the formal process known as "National Consultation Rights" prescribed in 5 U.S.C. 7113(b). In this context, OPM encourages constructive consultation that is characterized by non-binding, informal discussions between management and union representatives especially at the local or installation level concerning matters of mutual interest for the purpose of dispute avoidance or problem-solving. It is an adjunct or supplement to formal collective bargaining. It can take several forms depending on the parties' wishes, ranging from informal, ad hoc day-to-day communications between management and labor to joint labor-management participation in certain employee oriented programs such as those listed below. If consistent with an agency's mission, OPM policy is that agencies consider consultation on matters such as:

Improvement of agency productivity including "quality circles" programs;
Employee participation in occupational health and safety activities;
Equipment maintenance improvement programs;
Programs to reduce absenteeism;
Experimental and demonstration projects;
Energy conservation and commuting programs;
Blood assurance/donation plans;
Alcohol and drug abuse programs;
Credit union and banking services;
Suggestion awards system;
Troubled employee counseling;
Revisions to personal property security procedures;
Utilization of reduced work space;
Identification of training needs;
Developing an internal newsletter.
This list should not be regarded as including all matters to which agencies might apply this policy.

Thursday
July 14, 1983

SECRET

Part IV

**Office of Personnel
Management**

**Pay Administration Under the Fair Labor
Standard Act; Exemptions; Proposed Rule**

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Part 551****Pay Administration Under the Fair
Labor Standards Act; Exemptions****AGENCY:** Office of Personnel
Management.**ACTION:** Proposed rulemaking.

SUMMARY: The Office of Personnel Management is proposing further changes in the proposed Fair Labor Standards Act (FLSA) regulations published for comment on March 30, 1983. The purpose of these changes is to alleviate the discrepancy between OPM's exemption criteria and the exemption criteria which are applicable to employees in the private sector. The proposed regulations also provide criteria for applying the FLSA to employees on temporary duty and to employees who travel to or from foreign areas.

DATE: Comments must be submitted on or before August 15, 1983.**ADDRESS:** Send or deliver comments to Anthony F. Ingrassia, Assistant Director for Agency Compliance and Evaluation, Room 5450, Office of Personnel Management, Washington, D.C. 20415.**FOR FURTHER INFORMATION CONTACT:** Mario Caviglia (202) 632-5691.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) published on March 30, 1983, in the Federal Register 48 FR 13374-13377 proposed rules amending its exemption determination criteria under the FLSA. In response to this proposal, OPM received comments from 15 agencies, 15 unions and employee organizations, and 52 individuals. The comments from agencies were generally in favor of the proposal while the other comments were generally opposed. The comments on the proposal focused on several central issues:

**OPM'S Authority To Issue FLSA
Regulations**

Several labor organizations questioned whether OPM has the authority to issue regulations under the FLSA. In their view, while OPM has the authority to administer the FLSA for Federal employees, only the Department of Labor has the authority to issue FLSA regulations. We do not agree with this view. Section 4(f) of the FLSA provides:

Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission [now OPM] is authorized to administer the provisions of this Act with respect to any individual employed by the United States.

OPM was given the authority to administer the FLSA so that it could reconcile differences between the FLSA and existing Federal pay and classification statutes. This responsibility necessarily carries with it the authority to regulate. Indeed, it is the purpose of OPM's FLSA regulations to provide a framework for FLSA administration within the Federal sector. A direct application of DOL regulations to Federal employees is not feasible because DOL regulations do not take into account existing, sometimes conflicting, pay and classification statutes.

Several comments point to the mandate that Congress gave to OPM to administer the FLSA as consistently as possible with DOL's administration of the Act for the private sector. However, the incorrect conclusion is drawn from this mandate that OPM has no authority to regulate FLSA matters. In fact, this specific point was addressed in a colloquy on the House Floor:

MR. HENDERSON. Mr. Chairman, I would like to inquire of the gentleman from Pennsylvania the intent of the Education and Labor Committee by their language on page 28 of House Report 93-913 regarding the Civil Service Commission responsibilities under the Fair Labor Standards Act. The bill provides that the Civil Service Commission is authorized to administer the provisions insofar as Federal employees are concerned. The language in the report at page 28 (mandating CSC consistency with DOL) seems to be in conflict with the bill.

I assume that the Commission will have the authority to determine who in the Federal work force is covered and how the existing provisions of law on overtime for Federal employees are going to be administered when in conflict with the provisions of the Fair Labor Standards Act.

MR. DENT. Mr. Chairman, the gentleman is absolutely correct, and if there is any conflict in the report as opposed to the understanding the gentleman has given to the situation at this point, I can assure the gentleman that his views are correct.

MR. HENDERSON. Mr. Chairman, I thank the gentleman for his response to clarify this question and make legislative history. 120 Cong. Rec. 7335.

Furthermore, the Comptroller General of the United States has recognized OPM's authority to make exemption determinations.

We consider that the role granted to the Commission to administer the FLSA with respect to Federal employees, necessarily carries with it the authority to make final determinations as to whether employees are covered by the various provisions of the Act. Accordingly, this Office will not review the Commission's determinations as to an employee's exemption status. B-51325, October 7, 1976.

In this connection, the exemption regulations are intended to provide the criteria for determining exemption under the Act. As such they modify OPM's existing exemption regulations, which have been in effect since 1975, for the purpose of making them generally more consistent with DOL regulations. To the extent that OPM's proposed regulations differ from DOL's, OPM is exercising its responsibility to resolve conflicts between FLSA and Federal pay and classification statutes.

Presumption of Exemption at GS-11

Several labor organizations and individuals objected to the establishment of a presumption that employees properly classified at GS-11 or above are exempt. Objections to this provision were: (1) That this presumption would be inconsistent with DOL regulations; and (2) that OPM would be establishing an "irrebuttable presumption."

While there is no identical presumption in DOL regulations, it is justified for General Schedule (and GS equivalent) employees who are subject to a formal, statutory evaluation system. OPM has a dual responsibility in administering the FLSA and the pay and classification systems contained in title 5, United States Code. One responsibility is to ensure that Federal employees are protected by the minimum standards established by the FLSA. Another responsibility, however, is to administer the GS pay and classification schemes. DOL enforces the FLSA in the private sector arena where it encounters a vast spectrum of pay and evaluation systems.

OPM, on the other hand, administers the FLSA for GS and FWS employees who are classified under formal evaluation systems which are based on the difficulty, responsibility, and qualification requirements of the duties performed.

OPM invests a great deal of analysis and effort in developing its position classification standards. Agencies are required in turn to evaluate each position by reference to these standards. Classification accuracy is subject to review by the agency and by OPM, and employees have the right to appeal their classification at any time. In this context, OPM can justifiably presume that employees at a certain level of responsibility or above are performing exempt work. It should not be necessary to require agencies to perform a separate evaluation for FLSA purposes when the exhaustive evaluation required by the classification process results in a determination that an

employee is performing duties at a very high level of responsibility, difficulty, and complexity.

It must be noted that title 5 divides the General Schedule into two distinct categories. Those employees paid at less than the rate of GS-10, step 1, are entitled to time-and-a-half of their basic rate for overtime work. Those employees paid at the GS-10, step 1, rate or above are paid at the overtime rate of GS-10, step 1, regardless of grade level. In effect, title 5 provides a statutory division point above which employees are entitled to overtime compensation, but not to time-and-a-half. To determine that employees paid above the statutory break point are nonexempt creates pay distortions which frustrate the distinctions made by the General Schedule. Consequently, OPM believes that a presumption that employees above GS-10 are exempt is an appropriate reconciliation of title 5 and the FLSA and gives the fullest effect to both statutes while preserving the protective features of the FLSA for the segment of the workforce it was designed to protect.

With respect to the presumption of exemption, several labor organizations expressed additional opposition to the proposal on the grounds that FLSA exemption determinations should not be based in any part on classification. The labor organizations state that exemption determinations must be based on actual duties performed. We agree with this principle, but we do not agree that it precludes the relevance of classification in the exemption determination process. First, the primary use that OPM makes of the classification is as an equivalent to the DOL salary test. Since in all cases the salaries for the proposed grade levels exceed the DOL salary levels, the classification decision is sufficient for this purpose. The only additional use which this proposal is making of the classification grade decision is to establish a *presumption* that at the highest GS levels, *properly classified* employees are exempt. The classification decision demands a comprehensive evaluation of duties which when properly done is more than sufficient basis for this presumption. While it is true that the classification process focuses more on the position than on the employee, proper classification is ultimately based on the duties of a position as performed by an employee. Classification in the Federal sector is much more than the assignment of a job title. Rather, it is a statutorily required process which requires the assignment of an occupational series and grade level which is commensurate

with the level of responsibility, complexity, and qualifications required. For GS employees all pay determinations flow from the proper classification of the employee's position. Therefore, we do not believe that a presumption of exemption of a position at a defined high level of responsibility and pay, can be equated to the simplistic, prohibited practice of assigning exemption by reference to generic job titles. Rather, it represents the appropriate exercise of OPM's authority to implement the FLSA in a manner which is consistent with the Federal position classification process.

Furthermore, it must be remembered that exemption from the FLSA for a Federal employee does not mean that the employee cannot receive overtime benefits. Exempt employees are subject to the statutory overtime entitlements of title 5. Exemption for employees at the highest grade levels generally means a reduction in overtime benefits, not their elimination.

Several labor organizations also expressed the opinion that the presumption of exemption at GS-11 or above results in the establishment of an "irrebuttable presumption." OPM, however, in its role as enforcer of the FLSA, is proposing to establish a presumption of exemption. OPM recognizes, though, that there may be situations in which this presumption should not be assumed. For this reason, OPM would reserve the authority to authorize waiver of this presumption if it finds that it is not appropriate for a given occupation. Furthermore, the presumption would be based on proper classification. Obviously, employees would retain the right to appeal their classification and/or their exemption status.

Several agencies commented that the grade level at which exemption is presumed should be lowered. Since the cutoff in the General Schedule for time and a half is GS-10, we do not believe that exemptions should be presumed at levels in the General Schedule where exemption begins to become problematic.

Several labor organizations and individuals commented that by establishing a presumption of exemption OPM was shifting the burden of exemption from the employer to the employee. Again we emphasize the fact that this presumption would be made only after the agency fulfills the burden of proper classification of a position at high grade level pursuant to a formal evaluation procedure. OPM in its dual role as administrator of the FLSA and the position classification process

believes that proper classification at these grade levels justifies the presumption of exemption. Unlike DOL, OPM administers the pay and evaluation systems which are subject to its FLSA enforcement, and OPM may justifiably make a presumption of exemption which might not be valid for employees who are not subject to statutory classification and appeals procedures.

Definitions of Executive and Professional Employees

Several labor organizations objected to the linkage of the executive exemption to the classification definition of "supervisor" as defined in the Supervisory Grade Evaluation Guide (SSEG). This linkage has been in effect since the publication of FPM Letter 551-13 on February 21, 1978.

That FPM Letter is compatible with the existing executive exemption criteria and the change in the regulatory definition is being made simply for the purpose of clarification. OPM would not be changing the criteria to conform with FPM instructions. Rather, it would be changing the regulatory language to make it clear that the executive exemption is, and has been directly linked to the SSEG.

One agency suggested that the labor relations definition of "supervisors" (5 U.S.C. 7103(a)(10)) be used for FLSA exemption purposes to provide consistency. The FLSA concept of "executive" differs substantially from the labor relations definition however, and we do not believe this suggestion would be compatible with the FLSA or classification definition of supervisor.

There was also some concern about OPM's deletion of the phrase describing a professional as an employee "who is practicing a learned or artistic profession." This deletion is necessary to eliminate the internal inconsistency in the present regulatory definition which, as contained in the supplementary information to the proposed regulations, states that an employee who is "performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience . . . is eligible for exemption. The deleted phrase, if literally applied, would preclude exemption of employees who are classified at high grade levels precisely because they perform work comparable to that of professionals. This deletion, then, would simply be a correction of an internal inconsistency in a current regulation and would not reflect a change in the basic

professional exemption criteria or in OPM's policy.

Several comments objected to regulations on the grounds that DOL had considered expanding the professional definition to include technicians in precisely the same manner as proposed by OPM and had rejected that change in 1971. These comments ignore the fact that technicians can be exempted under current OPM regulations if they are performing work comparable to professional work. We believe the position classification process justifies a presumption that work of this comparable level is being performed if the position is classified properly at the high grade level.

Primary Duty Test

We received comments from individuals, labor organizations, and one agency that DOL should raise its salary tests, rather than OPM adjusting its grade level test to DOL standards. It is the responsibility of OPM to follow the general criteria determined by DOL to the extent possible within the context of Federal pay and classification statutes. Because OPM's grade cutoff period is so dramatically out of line with the DOL criteria, we believe that OPM cannot honor this mandate without adjusting its criteria to reflect more closely the DOL criteria. The fact that OPM criteria remain above the DOL salary tests and are tied to grade rather than salary reflect OPM's other mandate to integrate the exemption criteria into its pay and position classification processes.

Minimum Grade Level for Exemption

Several labor organizations objected to the standardization of the minimum grade level for exemption at GS-5. As we pointed out in the proposal, we expect few employees qualify for exemption at these grade levels. However, the General Schedule recognizes the existence of administrative and professional work at these levels. As adjusted, OPM's minimum grade levels for exemption would be higher than the high salary test of DOL and far above DOL's minimum salaries for exemption. Therefore, we believe that the standardization of the minimum level at GS-5 makes OPM's criteria more consistent with the DOL criteria and with OPM position classification standards.

Representative Workweek Concept

A number of labor organizations objected to the use of the representative workweek concept for making exemption determinations. They believe that exemption determinations should

be made on a separate workweek basis. The "representative workweek" concept has been used by OPM for the entire period of Federal FLSA administration. A pure workweek standard would result in an impossible administrative burden and is not required by the FLSA. The representative workweek concept is well established under current FLSA regulations for Federal employees.

General Schedule Overtime Rates

Many of the objections to the changes in the FLSA regulations were based on the misconception that OPM is thereby lowering the overtime rate payable under title 5, United States Code. A key feature of the FLSA change is the lowering of the point at which the "short test" is applied from GS-10 to GS-7. Apparently many people interpreted this action to be related to the statutory overtime cap under title 5 which limits overtime payable to GS employees to the rate payable to a GS-10, step 1. The assumption was that OPM was lowering the point at which the overtime cap is applied under title 5 from GS-10 to GS-7. The FLSA exemption regulations, however, affect only how exemption status under the FLSA is determined and have no effect whatsoever on overtime pay under title 5, or any other pay system.

Several comments also assumed that exempt employees are not entitled to overtime compensation. Exempt employees are covered, however, by the overtime provisions of title 5 or other appropriate pay system.

Waiver of Presumption of Exemption

Several labor organizations and one individual expressed concern about OPM's authority to waive the presumption of exemption. OPM believes that the classification system can be relied on to the extent of justifying a presumption at GS-11 and above. However, it also realizes that certain unique occupations may exist (e.g., air traffic control) where the presumption is not justified. Such situations may exist where a position, though classified at a high grade level, can be filled only by an employee with highly specialized technical skills and knowledges that can be acquired only through prolonged job training and experience.

One individual objected to the reference to air traffic controllers as an example of an occupation where exemption cannot be presumed at high grade levels. The Congress has recognized the uniqueness of this occupation by providing special legislation under title 5 (5 U.S.C. 5542) for overtime pay for controllers. In our

view, a reconciliation of title 5 and the FLSA does not warrant the presumption of exemption for non-supervisory air traffic controllers.

OPM believes that the exceptions to the presumption are rare and that agencies should not grant any exceptions without first seeking an advisory opinion from OPM. Since an exception to the presumption would tend to expand coverage, we do not believe that the rule making process is necessary to waive presumption. Also, neither the presumption of exemption nor its waiver are dispositive of an employee's exemption status, and the listing of specific exceptions to the presumption constitutes guidance to agencies rather than changes in regulatory criteria.

One agency suggested that OPM provide specific guidance for requesting waivers from the presumption. Our proposed regulation makes clear that while exemption at high grade levels is "presumed," OPM would provide advisory opinions if an agency believes the exemption criteria are not met. In addition, employees would retain the right to appeal their exemption status. Agencies bear the primary responsibility in making exemption determinations and assuring that the presumption is valid in a given agency. However, any agency which believes that a properly classified position at these grade levels should be nonexempt would be required to request an advisory opinion from OPM so that OPM can insure consistent administration of the FLSA and its classification standards. Any request would have to be submitted before action is taken by the agency, and would be sent to Agency Compliance and Evaluation, Compliance Division.

Temporary Duty

Several labor organizations objected to the principle of extending exemption status for short periods of temporary duty. These comments are primarily based on the assumption that exemption determinations must be made on a pure workweek basis. As we have emphasized, a simple workweek standard for exemption determinations would create an impossible administrative situation. At the same time, a detail of an employee to duties not included in the representative workweek cannot be ignored under the FLSA. With the protections provided in these proposed regulations, we believe that the FLSA can be implemented properly for employees on detail.

Two agencies requested that the language of these regulations be clarified to emphasize that it is the

classification of the employee's permanent position (unless the employee is temporarily promoted) which serves as the reference point for making exemption determinations during the detail. This suggestion was adopted. We have clarified the proposed regulations to allow for the exemption of employees on temporary duty only if they are subject to the primary duty or "short" test. This means that exempt GS-5, GS-6, and wage employees who are not General Foremen, could not be exempted under this proposal. This would insure that only employees who are paid commensurate with their responsibilities are exempted from the Act.

Several comments suggested that the regulations regarding emergencies be clarified to specify who has the authority to designate an emergency situation. This suggestion has been adopted and the proposed regulations make it clear that the agency has the ability to decide that an emergency situation exists.

Foreign Exemption

Several labor organizations objected to the regulations for foreign exemption on the grounds that international waters and air space are not foreign areas. The proposed regulation, however, does not define international waters and air space as foreign areas. It merely provides that when an employee who is permanently stationed in a foreign area travels into such waters or air space that fact alone is not sufficient to invoke the FLSA for employees who are normally not covered by the Act. Without this exception, agencies would be forced to track the whereabouts of foreign based employees to make sure they do not stray into international water or air space. The foreign exemption regulations are very restrictive and we believe that the treatment of international water and air space is consistent with the Act. Employees stationed in foreign areas would be covered if they spend any time at all in the United States. On the other hand, the foreign exemption would not apply to an employee permanently stationed in the United States unless the employee performs all hours of work in a foreign area.

One agency, in fact, objected to the requirement for FLSA coverage for employees who perform any work at all in a covered area. The agency believes that this creates an administrative burden for the agency in administering pay for employees who normally work in exempt areas. However, we do not believe that section 13(f) of the FLSA would allow application of the foreign

exemption in situations where employees work in the United States. This principle has been enunciated in a decision of the Comptroller General and is consistent with the policy which has been followed by many agencies in administering the FLSA.

Date of Implementation

Several agencies expressed concern about having sufficient time to implement the revised exemption criteria. Therefore, OPM proposes to allow for a 120 day period from the date of publication of the final regulations for implementation. We also would require agencies to request advisory opinions before making any waivers of the presumption of exemption principle within 45 days of date of publication, for those employees presently nonexempt at GS-11 or higher. Otherwise the regulations would go into effect for these categories of employees, as with others, after the 120 day period.

The Comptroller General and one agency expressed their position that these regulations should be applied prospectively from their effective date. We agree with this position since the regulations contain material revisions.

Miscellaneous

Two professional associations suggested specific exceptions for their professions to the presumption of exemption at GS-11 or above. These exceptions were predicated on the assumption that professionals would otherwise not be entitled to overtime compensation. Exempt professional employees are entitled to overtime pay under title 5. Furthermore, professionals at these grade levels should be exempt under the current criteria. The presumption of exemption should not affect the exemption status of employees currently classified in professional series.

We received several suggestions for editorial changes. Most of these were adopted.

Reduction of Comment Period for Proposed Rulemaking

The Director finds that, because this is an additional comment period to the initial 60 days during which OPM has received and thoroughly considered comments, good cause exists for setting the comment period on this proposed rulemaking at 30 days.

E.O. 12291, Federal Regulation

OPM has determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities since it only provides procedures for applying the exemption criteria of the Fair Labor Standards Act to Federal employees.

List of Subjects in 5 CFR Part 551

Government employees, Wages, Fair Labor Standards Act, Travel, Manpower training programs, Administrative practice and procedure.

U.S. Office of Personnel Management.
Donald J. Devine,
Director.

Accordingly, the Office of Personnel Management is proposing to amend Part 551 of Title 5, Code of Federal Regulations, as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

1. Section 551.102 is amended by adding paragraph (h) to read as follows:

§ 551.102 Definitions.

(h) "Exempt area" means any foreign country, or any territory within the jurisdiction of the United States other than the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 482);
- (6) American Samoa;
- (7) Guam;
- (8) Wake Island;
- (9) Eniwetok Atoll;
- (10) Kwajalein Atoll; and
- (11) Johnston Island.

2. Subpart B of Part 551 is revised to read as follows:

Subpart B—Exemptions

- Sec.
- 551.201 Agency authority.
 - 551.202 General principles governing exemptions.
 - 551.203 Exemption of general schedule employees.
 - 551.204 Executive exemption criteria.
 - 551.205 Administrative exemption criteria.
 - 551.206 Professional exemption criteria.
 - 551.207 Exceptions by OPM.
 - 551.208 Foreign exemption.
 - 551.209 Application of the executive, administrative, and professional exemption criteria for periods of temporary duty.

Subpart B—Exemptions**§ 551.201 Agency authority.**

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that:

- (a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
- (b) The burden of proof rests with the agency that asserts the exemption.
- (c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of general schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt:

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart:

(c) Except as provided in § 551.207 of this subpart, any employee properly classified at GS-11 or above (or the equivalent level in other white collar pay systems) shall be presumed to be exempt under this subpart. An agency that properly classifies an employee at GS-11 or above shall be deemed to have satisfied the burden of proof for asserting exemption.

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who supervises at least three subordinate employees and who meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. This primary duty requirement is met if:

(1) The employee is a General Schedule employee whose position is determined to be "Supervisory" or "Managerial" under the Supervisory Grade-Evaluation Guide;

(2) The employee is a Federal Wage System employee whose position fully meets or exceeds the "Foreman range of responsibility" as defined in the Job Grading Standard for Supervisors; or

(3) The employee is subject to a pay system other than the General Schedule or the Federal Wage System and the employee's position meets or exceeds the definition of Supervisor in the Supervisory Grade-Evaluation Guide or the employee's position fully meets or exceeds the "Foreman range of responsibility" as defined in the Job Grading Standard for Supervisors.

(b) In addition to the primary duty criterion that applies to all employees, Foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems) and employees classified at GS-6 or below (or the equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

§ 551.205 Administrative exemption criteria.

An administrative employee is an advisor, assistant or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that:

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly nonmanual work which is:

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-6 or below (or the equivalent in other salary systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the

administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of:

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees: General Schedule employees classified at GS-6 or below (or the equivalent in other salary systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

§ 551.207 Exceptions by OPM.

The Office of Personnel Management will provide advisory opinions on agency-proposed exceptions to the presumption of exemption for specific occupations at GS-11 or above (or the equivalent level in other white collar pay systems) which is specified in § 551.203(c) of this subpart. Exceptions may not be made before OPM consideration; requests for advisory opinions from agencies should be sent to: Office of Personnel Management, Agency Compliance and Evaluation, Compliance Division, 1900 E Street, N.W., Washington, D.C. 20415.

§ 551.208 Foreign exemption.

(a) This section provides criteria for applying the "foreign exemption" contained in section 13(f) of the Act. An employee who is exempt under the foreign exemption is not subject to the minimum wage and overtime provisions of the Act. The exemption status of an employee to whom the foreign exemption is not applicable shall be determined under the general criteria contained in this subpart.

(b) Except as provided in § 551.208(d), an agency shall apply the foreign exemption to any employee who is permanently stationed in an "exempt area" as defined in § 551.102(h).

(c) An agency shall also apply the foreign exemption on a workweek basis to an employee on temporary duty who is not permanently stationed in an exempt area, but who performs *all* hours of work in a given workweek in an exempt area.

(d) The foreign exemption is not applicable to an employee permanently stationed in an exempt area for any given workweek in which the employee performs *any* hours of work in the United States or in a territory under the jurisdiction of the United States.

§ 551.209 Application of the executive, administrative, and professional exemption criteria for periods of temporary duty.

(a) This section is not applicable when an employee is detailed to an identical additional position or to a position of the same grade, series code, and basic duties as the employee is regularly assigned to. This section applies only when an employee is assigned to perform duties which are not included in the employee's representative workweek. For the period of any such temporary duty, the exemption criteria contained in §§ 551.202 through 551.207 of this

subpart shall be applied using the procedures specified in this section.

(b) A nonexempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain nonexempt for the period of the detail unless:

(1) The employee's permanent position is classified at GS-7 or above (or the equivalent level in other white collar pay systems), and the temporary duty exceeds 30 days, and the employee's primary duty for the period of the temporary duty is executive, administrative, or professional duty, in which case the employee is exempt for the entire period of the temporary duty;

(2) The employee is temporarily promoted to a position classified at GS-7 or above (or the equivalent level in other white collar pay systems), and the employee's primary duty for the period of the temporary duty is executive, administrative, or professional duty; or

(3) The employee is a prevailing rate employee who is temporarily promoted to a Foreman position and the employee's primary duty for the period of the temporary duty is executive duty and the employee spends no more than 20 percent of a given workweek performing nonexempt duties, in which case the employee is exempt for that workweek.

(4) The employee is a prevailing rate employee who is temporarily promoted to a General Foreman position and the employee's primary duty for the period of the detail is executive duty.

(c) An exempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt for the period of the detail unless:

(1) The employee's permanent position is classified at GS-7 or above (or the equivalent level in other white collar pay systems), and the detail exceeds 30 days, and the employee's

primary duty for the period of the temporary duty is not executive, administrative, or professional duty in which case the employee is nonexempt for the entire period of temporary duty;

(2) The employee's permanent position is classified at GS-5 or GS-6 (or the equivalent level in other white collar pay systems) and the employee spends more than 20 percent of a given workweek performing nonexempt duties, in which case the employee is nonexempt for that workweek;

(3) The employee is a General Foreman and the detail exceeds 30 days and the employee's primary duty for the period of the temporary duty is not executive duty in which case the employee is nonexempt for the entire period of temporary duty;

(4) The employee is a prevailing rate employee who is not a General Foreman and the employee spends more than 20 percent of a workweek performing nonexempt duties, in which case the employee is nonexempt for that workweek.

(d) Notwithstanding § 551.209 (b) and (c) and regardless of an employee's grade level, the agency may determine that an emergency situation exists which threatens the life or safety of people, or serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to perform emergency duties. In such a designated emergency the exemption status of an employee shall be determined on a workweek basis and the employee shall be nonexempt for any workweek in which the employee performs more than 20% nonexempt work.

(29 U.S.C. 204(f))

[PR Doc. 83-19087 Filed 7-13-83; 8:45 am]

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Thursday
July 14, 1983

SECRET

Part V

**Office of Personnel
Management**

**Performance Management System;
Proposed Rule**

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Parts 300, 335, 430, 431, 451,
531, 532 and 540****Performance Management System****AGENCY:** Office of Personnel
Management.**ACTION:** Proposed rulemaking.**SUMMARY:** The Office of Personnel
Management is proposing new
regulations to implement Performance
Management including a Performance
Based Incentive System for the General
Schedule. These proposals reflect major
comments on a recent proposal to create
a system designed to pay employees
based on individual job performance.**DATE:** Comments on the proposed rule
must be received by August 15, 1983.**ADDRESS:** Send or deliver written
comments to: John W. Fossum, Assistant
Director for Performance Management,
Workforce Effectiveness and
Development Group, Office of Personnel
Management, 1900 E Street, N.W., Room
7520, Washington, D.C. 20415.**FOR FURTHER INFORMATION CONTACT:**
James Weddel, 202-632-7630.**SUPPLEMENTARY INFORMATION:****Background**

On March 30, 1983 OPM proposed
revisions to 5 CFR Parts 300, 335, 430,
451, 531, 532 and 540, and a new Part 431
that would require agencies to
implement the Performance
Management System (48 FR 13342). A
60-day comment period was provided,
during which OPM requested comments
and suggestions.

During the comment period, we
received a large number of very
comprehensive comments. We have
carefully reviewed and analyzed these
comments, adopted many suggestions,
and made several major modifications
to the original proposals.

The changes to be brought about by
the proposed performance management
system will be substantial. Therefore,
we are publishing the proposed
regulations for a new, abbreviated,
comment period.

This will give agencies advance notice
and additional lead time to implement
the performance management systems,
and will provide all interested parties
with an opportunity to comment on the
proposals.

Comments

During the 60-day comment period,
OPM received comments from 53
Federal agencies, 70 Congressional
members, 13 professional organizations,

7 labor organizations, and 856
individuals, most of whom were Federal
employees. Many of the comments
contained specific, constructive
suggestions; OPM proposes to adopt
many of those suggestions in this
document. It should be noted, however,
that this document only reflects major
changes to the proposals and some
further technical suggestions may be
incorporated into the final regulations. It
may also be necessary to make
nonsubstantive conforming revisions to
Parts 351, 432, and 771 when final
regulations are published.

**Overview of the Performance
Management System**

Agency, union, and individual
comments on proposed Performance
Management System regulations have
been carefully read and assessed. The
new Performance Management System
regulations which we are proposing will
meet OPM's primary objectives and, we
believe, will also meet agency needs
and objectives.

The regulations would establish a pay
for performance system and provide
needed revisions to merit pay.
Performance salary ceilings would be
established, reserving the top third of
each pay range for employees rated
higher than Fully Successful. (One
significant problem OPM identified in
analyzing the comments was that many
individuals had the false impression that
within-grade increases were to be
eliminated altogether). The pay of
Outstanding performers would be
increased more rapidly than the pay of
average or marginal employees through
mandatory Quality Step Increases and
matrix merit payout models.

Performance awards would be
established. Performance awards and
QSI's would be provided as soon as
possible after annual performance
ratings are approved, emphasizing the
link between pay and performance in
the minds of employees and their
supervisors. Employees could earn a
Performance Award for performance
that Exceeds Fully Successful overall or
on one or more critical element(s) of a
job. Each agency would be required to
obtain OPM approval of a minimum pay
differential for Outstanding merit pay
employees.

The regulations would also meet
agency and OPM concerns about the
cost, paperwork, and time requirements
of Performance Management. Agencies
would not be required to convert "point"
merit pay systems to "percentage"
systems. Agencies and OPM would not
be involved in complex and expensive
computer based funding formula
calculations. Instead, agencies would

simply forecast their annual funding for
QSI's and performance awards for OPM
approval and provide annual reports of
actual expenditures.

The regulations would contain
provisions making Performance
Management and the comment process
credible with employees, Congress, and
the public. Employees would be able to
seek a reconsideration if they felt that
appraisals were unfair. Agencies would
not be able to utilize preestablished
rating distributions that interfere with
appraisal of actual performance against
standards, but must provide for second
level review of ratings in the interest of
employee equity and ensuring that
ratings are consistent with
organizational accomplishments.
Through that process, managers should
change inaccurate appraisals. Critical
elements, non-critical elements, and
performance standards must be related
to an employee's assigned work and
higher level approval of elements and
standards is required.

The regulations would require each
agency to establish a Performance
Management Plan for OPM approval.
Agencies would be able to tie the
establishment and revision of
performance elements and standards to
the beginning of management planning
cycles so that employee performance
expectations could clearly support
achievement of organizational goals and
objectives. Performance ratings and
performance based personnel actions
could then reflect each employee's
contribution during the past year to
achievements in support of the
organization's purposes and mission.

The regulations standardize
performance ratings among agencies by
requiring five rating levels for critical
elements and five summary rating
levels. The regulations also standardize
performance requirements for within-
grade increases, performance awards,
quality step increases, career ladder
promotions, and merit pay. For the first
time, regulations would be established
for SES performance appraisal. The SES
regulations would parallel appraisal
requirements for other employees.

**Key Issues Proposed in the New
Regulations**

The following are the key issues
raised in the proposed regulations, a
general summary of comments which
have been received in these areas, and
an explanation of the proposals:

1. Use of Critical Elements:**a. Section 430.204(b).****b. Agencies indicated a need to
measure performance on the whole job.**

c. Proposed regulations would permit the use of non-critical elements to identify and appraise aspects of employees' work that does not meet the definition of "critical element" set forth in 5 CFR 430.203(e). A noncritical element would be defined as a component of an employee's job which does not meet the definition of a critical element, but is of sufficient importance to warrant appraisal and assignment of an element rating. Ratings on non-critical elements could not be used to derive summary ratings.

d. This regulation permits agencies to appraise employees on developmental, collateral, and other non-critical duties while retaining the concept that performance on critical elements should be a basis for the most important performance management decisions.

2. Definitions and Use of Required Rating Levels:

a. Section 430.204(d): new Section 430.204(f).

b. Agencies preferred multiple written standards to one at the Fully Successful level and recommended changes to the rating level definitions.

c. Proposed regulations would provide more operationally oriented definitions of the required rating levels, would delete language about the distribution of ratings within the definitions, and would include the multiple standards requirement (see FPM Letter 430-4 of 3/19/81).

d. This regulation provides more clearly stated and succinct definitions of the required rating levels and includes the current OPM requirement for sufficient performance standards to assure accuracy of ratings.

3. Prestablished Distribution of Expected Levels of Performance:

a. Section 430.203(d) was deleted; new Section 430.204(e).

b. Agencies were concerned about the credibility of the performance appraisal system and about ensuring equitable and accurate appraisals.

c. This regulation would prohibit agencies from using preestablished rating distributions but would require that agencies provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

d. The prohibition of preestablished rating distributions helps to ensure that employees are accurately appraised against the standards for their positions. Second level review provides for management of the process to ensure equity and consistency with organizational accomplishments.

Timing of Ratings:

a. Section 430.204(g): new Section 430.204.

b. Agencies indicated an inability to ensure consistency of ratings, difficulty in tracking anniversary dates, and inability to link the appraisal process with planning and budget cycles.

c. This proposal would simply require that employees be given performance ratings on at least an annual basis. Thus, appraisals could be tied to anniversary dates or organizational planning cycles. If a schedule other than anniversary dates were to be used, an additional appraisal would be prepared when a within-grade decision was not supported by the last annual appraisal.

d. This proposal permits a closer tie between performance appraisals and agency management and planning cycles while maintaining the link between appraisals and within grade increase decisions. It also provides greater ability to compare employees when appraisals are given.

5. Grievances and Appeals of Performance Ratings:

a. Section 430.204(j).

b. Agencies recommend some form of internal administrative review of performance ratings.

c. This proposal would provide for reconsideration of ratings by the approving official at the employee's request.

d. This provides for redress if an employee thinks that he or she has received an inaccurate appraisal while retaining management responsibility for appraising employee performance.

6. Performance Management Plans:

a. Section 430.207(a)(4).

b. Some agencies raised concern about OPM's mandating an awards fund computation formula.

c. This regulatory proposal would require that agencies establish a PBIS funding forecast and allocation policy for determining and distributing within-grade increases, quality step increases, and performance awards. Agencies would be expected to include in their plans the previous year's actual expenditures as well as projections of the coming year's allocation.

d. This provides for greater agency control and more systematic and practical approach for allocation of all performance based funds.

7. Implementation Timing:

a. Section 430.301.

b. Agencies indicated a need for more time for plan development, union negotiation, training, and computer programming.

c. These regulations would require, as originally proposed, implementation within 180 days after final publication of the regulations. In addition, they would

provide that decisions based on performance appraisals under new Performance Management Plans begin as soon as possible but not later than the first day after the first applicable pay period which begins on or after October 1, 1984. The regulations also provide for OPM to approve exceptions upon request.

d. These regulations provide greater flexibility for agencies to consider unique circumstances in applying the provisions of the regulations and to allow for orderly implementation.

8. SES Performance Appraisal:

a. Section 431.204(g); Section 431.204(i).

b. A majority of the agencies did not oppose the new regulation.

c. Most of the changes are written to parallel changes to 5 CFR 430. In addition, § 431.204(g) is changed to eliminate the specific dates for completion of ratings. Section 431.204(i) provides exceptions for higher level approval of elements and standards when they are written by an agency head.

9. Career Ladder Promotions and Time-in-Grade Restrictions:

a. Section 335.104.

b. Agencies were generally favorable to requiring "Fully Successful" ratings for career ladder promotions but opposed additional time-in-grade restrictions due to their potential impact on recruiting and retaining the best employees and the resultant likelihood of substituting more time-consuming competitive procedures for career ladder promotions. Concerns were also raised about possible conflicts with classification and qualification requirements.

c. The proposal retains the requirement for a "Fully Successful" summary rating in order to be eligible for a career ladder promotion and also requires ratings of Fully Successful or better on all critical elements that are critical to the position at the next higher grade level in the career ladder. In addition, the proposal would require that employees with the highest summary ratings be given first consideration for career ladder promotions when all eligible employees cannot be promoted or will not be promoted at the same time.

d. These regulations retain the connection of performance to career ladder promotions by requiring agencies to carefully consider both summary ratings and critical element ratings in making such promotions. The simplicity and flexibility provided by a career ladder system for internal promotion is also retained and perceptions of

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conflicts with classification and qualification requirements are avoided.

10. Tangible Benefits Scales:

- a. Section 451.205(b).
- b. Some agencies were confused as to whether the award amounts indicated were maximums or prescribed amounts.
- c. These regulations clarify the purpose and use of the table.
- d. Regulatory language makes it clear that amounts are maximums.

11. Group Awards:

- a. Section 451.206(a).
- b. Some agencies indicated concern that group awards were not adequately provided for.

- c. The proposal extends the Special Awards authority to group awards.
- d. This language corrects an oversight in the earlier proposals. Agencies can provide Special Awards to groups as well as individuals.

12. Special Awards for One-Time Accomplishment:

- a. Section 451.206(a)(1).
- b. This regulation provides that special awards may be given for one-time special accomplishments for special acts or services.

- c. This provision fills a gap in the proposed regulations.

13. Documentation of Awards:

- a. Sections 451.207(b) and 531.601(b).
- b. This regulation adds a requirement to record awards documentation in the Official Personnel Folder (OPF).
- c. The OPF is the permanent record and basis for all personnel decisions and, therefore, must include performance and award information.

14. Timing and Quality Step Increases:

- a. Section 531.506(a).
- b. Agencies were concerned that this regulation did not promote good management practices regarding the reinforcement effect of granting awards promptly.
- c. This proposal would require that all Quality Step Increases be effective as soon as possible after performance appraisals are approved. It would replace the earlier proposal for granting mandatory QSI's on anniversary dates and optional QSI's on the annual October adjustment dates.

- d. This further reinforces the concept of pay for performance by linking the pay adjustment as close in time as possible to the appraisal. Funding controls would be maintained by the PBIS fund plan that would be required by Section 430.207(a)(4).

15. Amounts of Performance Awards:

- a. Section 531.605(a)(3).
- b. Agencies recommended that the size of performance awards be left to the discretion of the agency head.

- c. This regulatory proposal would require that performance awards be based on a percentage of the employee's base pay, up to a maximum of 15 percent. The maximum 15 percent would include any within-grade increase or quality step increase granted to the employee.

- d. This provides greater integration of performance awards and other aspects of pay-for-performance and prevents dual compensation for the same performance achievement.

16. Eligibility for Performance Awards:

- a. Section 531.606(a)(4).
- b. Agencies indicated it is inconsistent to grant performance awards to an employee with Fully Successful ratings, but deny within-grade increases to the same employee.

- c. This proposal provides that the superior accomplishments or other contributions for which an award is granted must be supported by a performance rating of Exceeds Fully Successful on one or more elements of a job or a summary performance rating of at least Exceed Fully Successful.

- d. This further supports the concept of pay-for-performance by clearly linking awards to the appropriate level of performance.

17. Timing of Performance Awards:

- a. Section 531.609(d)(4).
- b. Agencies were concerned that this regulation did not promote good management practices regarding the reinforcement effect of granting awards promptly.

- c. This proposal would require that agencies grant performance awards as soon as possible after performance appraisals are approved or as soon as possible after an assessment of performance indicates that an award should be granted. It would eliminate the earlier proposal that awards be linked to specific milestones in the performance cycle.

- d. This further reinforces the concept of pay for performance by linking awards closely in time with appraisals. Funding controls would be maintained by the PBIS fund plan that would be required by Section 430.207(a)(4).

18. Merit Pay Matrix:

- a. Section 540.110(b).
- b. Some agencies commented that the cost of converting to a percentage system would be excessive.

- c. These proposals would provide that agencies may use either percentage or point-matrix systems.

- d. Although percentage matrix systems have advantages, agencies can meet Performance Management System goals without changing from a point system.

19. Merit Pay Differential for Exceeds Fully Successful Performance:

- a. Section 540.110(f).
- b. Many agencies felt that the regulation was overly prescriptive.
- c. This proposal eliminates the requirement that "Exceeds" employees be granted some required amount more than Fully Successful employees and less than Outstanding employees.
- d. This will grant agencies more flexibility in managing their merit pay systems.

20. Appraisal of Disabled Veterans:

- a. Section 430.204(p).
- b. New language has been included in the performance appraisal regulations to ensure that a disabled veteran's performance rating is protected while the veteran is absent from work to seek medical treatment, in accordance with E.O. 5396.

E.O. 12291 Federal Regulation

OPM has determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Government employees.

Reduction of Comment Period for Proposed Rulemaking

The Director finds that, since OPM has received and thoroughly considered sufficient comments, and because agencies need to begin early implementation to integrate their new requirements into their performance appraisal and merit pay cycles, good cause exists for setting the comment period on this proposed rulemaking at 30 days.

List of Subjects

5 CFR Part 300

Government employees.
Administrative practice and procedure.

5 CFR Part 335

Government employees.

5 CFR Part 430

Government employees.
Administrative practice and procedure.
Reporting and recordkeeping requirements.

5 CFR Part 431

Government employees.
Administrative practice and procedure.
Reporting and recordkeeping requirements.

5 CFR Part 451

Decorations, Medals, Awards,
Government employees.

5 CFR Part 531

Government employees, Wages,
Administrative practice and procedure.

5 CFR Part 532

Administrative practice and
procedure, Government employees,
Wages.

5 CFR Part 540

Government employees, Wages.

U.S. Office of Personnel Management.

Donald J. Devine,

Director.

Accordingly, the Office of Personnel
Management proposes to amend Title 5,
Code of Federal Regulations, as follows:

PART 300—EMPLOYMENT (GENERAL)**Subpart F—Time-In Grade Restrictions**

1. Section 300.602 is revised to read as
follows:

§ 300.602 Restrictions

The time-in-grade restrictions in this
subpart are subject to the eligibility
requirements based on performance in
§ 335.104.

(a) *Advancement to positions at GS-12 and above.* An agency may advance an employee to a position at GS-12 or above only after he or she has served a minimum of 1 year in the next lower grade.

(b) *Advancement to positions at GS-6 through GS-11.* An agency may advance an employee to a position at GS-6 through GS-11 only after he or she has served a minimum of:

(1) One year in a position two grades lower, when the position to which he or she is advanced is in a line of work properly classified at two-grade intervals; or

(2) One year at the next lower grade when the position to which he or she is advanced is in a line of work properly classified at one-grade intervals.

(c) *Advancement to positions at GS-5 or below.* An agency may advance an employee to a position at GS-5 or below which is not more than two grades above the lowest grade he or she held within the preceding year under a non-temporary appointment.

PART 335—PROMOTION AND INTERNAL PLACEMENT**Subpart A—General Provisions**

2. Section 335.104 is added, to read as follows:

§ 335.104 Eligibility for career ladder promotion.

(a) No employee shall be promoted to a position in a recognized career ladder unless his or her summary rating on the most current performance appraisal under Part 430 of this chapter is "Fully Successful" or higher. In addition, no employee may receive a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

(b) Employees with the highest summary ratings must be given first consideration for career ladder promotions when all employees who are eligible will not be promoted or will not be promoted at the same time.

3. Part 430 is revised to read as follows:

PART 430—PERFORMANCE APPRAISAL**Subpart A—Statutory Authority.**

Sec.

430.101 Statutory authority.

Subpart B—Regulatory Requirements of the Office of Personnel Management

430.201 Purpose.

430.202 Coverage.

430.203 Definitions.

430.204 The performance appraisal process.

430.205 Training and evaluation.

430.206 OPM review of appraisal systems.

430.207 Performance Management Plans.

Subpart C—Implementation

430.301 Implementation of this part.

Authority: 5 U.S.C. 4305.

Subpart A—Statutory Authority**§ 430.101 Statutory authority.**

Chapter 43 of title 5, United States Code (5 U.S.C. 4301-4305) provides for the establishment of agency performance appraisal systems and for appraisal of employees. This part contains regulations which the Office of Personnel Management has prescribed for non-SES Performance Appraisal Systems and supplements the provisions of 5 U.S.C. 4301-4305.

Subpart B—Regulatory Requirements of the Office of Personnel Management**§ 430.201 Purpose.**

It is the purpose of this subpart to ensure that performance appraisal systems are used as a tool for executing basic performance management responsibilities by:

(a) Communicating and clarifying agency goals and objectives.

(b) Identifying individual accountability for the accomplishment of organizational goals and objectives.

(c) Evaluating and improving individual and organizational accomplishments, and

(d) Using appraisals as a basis for pay and other personnel actions.

§ 430.202 Coverage.

(a) *Employees and agencies covered by statute.* (1) 5 U.S.C. 4301(1) lists agencies covered by this part.

(2) 5 U.S.C. 4301(2) lists employees covered by statute by this part.

(b) *Statutory Exclusions.* This subpart does not apply to agencies or employees excluded by 5 U.S.C. 4301 (1) and (2), the United States Postal Service and the Postal Rate Commission.

(c) *Administrative exclusion.* OPM may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(C). The following are excluded: (1) Positions in Schedule C as authorized by § 213.3301 of this chapter.

(2) Positions filled by Noncareer Executive Assignments under 5 CFR Part 305.

(3) Positions for which employment is not reasonably expected to exceed 120 days in a consecutive 12-month period.

(d) *Agency requests for exclusions.* Heads of agencies or their designees may request the Director of the Office of Personnel Management to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

§ 430.203 Definitions.

In this part, terms are defined as follows:

Appraisal means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s) for the appraisal period in order to arrive at ratings for individual critical elements and a summary rating for overall performance.

Appraisal period means the period of time established by an appraisal system for which an employee's performance will be reviewed and for which a performance rating will be given.

Appraisal system means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5, United States Code and Subpart B of this part which provides for establishment of performance standards, identification of critical elements, communication of standards and critical elements to employees, establishment of methods and procedures to appraise performance against established standards, and

appropriate use of appraisal information in making personnel decisions.

Critical element means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that acceptable performance on the element is necessary for acceptable performance in the position.

Non-critical element means a component of an employee's job which does not meet the definition of a critical element, but is of sufficient importance to warrant appraisal and the assignment of an element rating. Non-critical elements may not be used in deriving a summary rating.

Performance means an employee's accomplishment of assigned duties and responsibilities as specified in the critical elements of the employee's position.

Performance Plan means the aggregation of all of an employee's critical elements and described performance standard(s).

Performance standard means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

Rating means the outcome of the appraisal of each critical element and overall performance expressed as one of the following five descriptive levels: "Outstanding," "Exceeds Fully Successful," "Fully Successful," "Minimally Successful," and "Unacceptable."

§ 430.204 The performance appraisal process.

(a) As required by 5 U.S.C. 4302(a), each agency shall establish one or more appraisal systems for appraising the work performance of employees during an appraisal period.

(b) Critical elements and non-critical elements may be included in Individual Performance Plans. An employee must be appraised and rated on each critical element of the employee's position. An employee must also be given a summary rating of overall performance. An employee who is given an Unacceptable rating on one critical element must be assigned a summary rating of Unacceptable. Non-critical elements may not be used to derive summary ratings. Agency appraisal systems may not provide for appraisal of subelements.

(c) Agency appraisal systems shall provide for five rating levels for each critical element and five summary rating levels. The required critical element and summary rating levels are "Outstanding," "Exceeds Fully Successful," "Fully Successful," "Minimally Successful," and "Unacceptable." The requirement for five rating levels does not apply to non-critical elements. Pass/fail elements are tasks, not true elements, and therefore cannot be used as a performance element in an appraisal. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level.

(d) For critical elements, performance standards must be written at the "Fully Successful" level, at the "Exceeds Fully Successful" or "Outstanding" level, and at the "Minimally Successful" or "Unacceptable" level. For non-critical elements, performance standards must be written at the "Fully Successful" level. Agencies wishing to rate more than one level above or below the Fully Successful level must write additional standards to conform with the multiple standards requirement.

(e) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as the requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards. However, agencies must provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

(f) Definitions of the five required rating levels follow. Performance standards and agency procedures for deriving summary ratings must be consistent with these definitions.

(1) "Outstanding" means performance of rare very high quality. An Outstanding performer produces an exceptional quantity of work significantly ahead of established schedules or deadlines and with very little supervision.

(2) "Exceeds Fully Successful" means performance of unusually good or excellent quality. The employee produces a very high quantity of work ahead of established schedules or deadlines and with less than normal supervision.

(3) "Fully Successful" means performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work.

(4) "Minimally Successful" means performance which does not consistently meet job expectations and requirements for the "Fully Successful"

level. This may be evidenced by the need for close supervisory review, discussion, and correction of work products. When performance falls below "Fully Successful," it may be necessary to take remedial action.

(5) "Unacceptable" means performance of an employee which fails to meet established performance standards in one or more critical elements of the employee's position. When performance is "Unacceptable," corrective action must be taken.

(g) 5 U.S.C. 4302 (a) and (b) require that each appraisal system shall provide for establishing performance standards based on requirements of employees' positions, communicating the standards of performance and the critical elements of the position at the beginning of each appraisal period, and appraising employees based on a comparison of performance with the standards established for the appraisal period. An agency shall encourage employee participation in establishing performance standards.

(h) Critical elements, non-critical elements, and performance standards must be related to the employee's assigned work.

(i) Employees shall generally be given performance ratings on at least an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant. When a within-grade increase decision is not supported by the last annual appraisal, an additional appraisal must be prepared. Agency appraisal system shall establish a minimum appraisal period of not less than 90 calendar days.

(j) Critical elements, non-critical elements, and performance standards shall be in writing and shall be reviewed and approved by a supervisor or manager at a higher level than the appraising official.

(k) Periodic performance ratings and performance based personnel actions shall be reviewed and approved by a supervisor or manager at a higher level than the appraising official. Performance ratings shall be in writing and shall be provided to the employee. Performance ratings may not be communicated to employees prior to approval by a higher level reviewer.

(l) An employee may not grieve or appeal a performance rating. The assignment of a performance rating is management right under 5 U.S.C. 7106(a) which reserves to management the right to direct employees and to assign work. Within the context of management rights, however, an employee is given the right to ask for reconsideration

performance rating decision by the official who was the higher level supervisor or manager of the appraising official. This reconsideration will be in the interest of ensuring fairness of an individual's rating.

(m) Agencies shall provide written critical elements and performance standards to employees at the beginning of a detail or temporary assignment within the same agency when the detail or temporary assignment is expected to last longer than the minimum appraisal period established by the agency. Performance ratings must be prepared for these details and temporary assignments and must be considered in deriving an employee's summary rating for the appraisal period.

(n) When an employee is detailed or temporarily assigned outside of the agency, the agency shall either extend the employee's performance rating of record or the agency shall obtain relevant appraisal information from the agency or organization to which the employee is detailed or temporarily assigned and consider the information when preparing a performance rating at the end of the appraisal period.

(o) Performance appraisals and ratings shall be used:

(1) To provide employees with information on their performance and how it may be improved.

(2) As a basis for decisions to grant awards; grant or withhold pay increases, i.e., within-grade increases, step increases, and quality step increases; grant merit pay; reassign; promote; develop; retain in reduction in force; and reduce in grade or remove.

(p) The performance rating of a disabled veteran may not be lowered because the veteran has been absent from work to seek medical treatment in accordance with Executive Order 5396.

§ 430.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 430.206 OPM review of appraisal systems.

(a) The Office of Personnel Management will review performance appraisal systems to determine if they conform to requirements of law and OPM regulations. The Office of Personnel Management will also review appraisal systems with respect to their contribution to agency effectiveness and

efficiency and appropriate use of performance information in personnel decisions.

(b) If the Office of Personnel Management determines that an appraisal system does not meet the requirements of Subchapter I of 5 U.S.C. 43 or of this part, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 430.207 Performance Management Plans.

(a) Agencies must submit proposed Performance Management Plans to the Office of Personnel Management for review and approval. Performance Management Plans shall include each of the following which is applicable to the agency and any additional information requested by OPM:

(1) Appraisal Systems required under 5 U.S.C. 4302 and 4312. Submissions may either be agency-wide appraisal systems or requirements which the systems of subordinate organizations must meet.

(2) Merit Pay System Plans required by 5 CFR Part 540.

(3) Performance Award Plans required by 5 CFR Part 531.

(4) Plans for determining and distributing Within-grade Increases, Quality Step Increases and the agency performance award fund, including previous years and projected expenditures.

(5) A report of provisions of any existing negotiated agreements which conflict with these regulations.

(b) Proposed changes to approved Performance Management Plans which would have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

Subpart C—Implementation

§ 430.301 Implementation of this part.

(a) Each agency covered by Subparts A and B of this part or by 5 CFR Part 540 shall submit Performance Management Plans to the Office of Personnel Management for review within 120 days after (final publication of these regulations).

(b) Agencies will be required to implement the provisions of an approved Performance Management Plan not later than (180 days after final publication of these regulations).

(c) Decisions based on performance appraisals under the agency's Performance Management Plan must begin as soon as possible but no later than the first day of the first applicable

pay period which begins on or after October 1, 1984.

(d) Agencies shall implement their Performance Management Systems to the maximum extent possible, except where provisions of an existing negotiated agreement are in explicit conflict with the regulations. Agencies may request OPM approval of exceptions to this requirement: (1) For specific provisions of the regulations that are not in explicit conflict with existing provisions of a labor agreement but would cause significant inequities if implemented in combination with provisions of the labor agreement, or (2) where apparently conflicting provisions of the regulations can be implemented without violating the intent of the agreement (e.g., where an agreement calls for five rating levels with different names).

4. A new part 431 is added, to read as follows:

PART 431—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

Subpart A—Statutory Authority

Sec.

431.101 General.

Subpart B—Regulatory Requirements of the Office of Personnel Management.

431.201 Purpose.

431.202 Coverage.

431.203 Definitions.

431.204 The performance appraisal process.

431.205 Training and evaluation.

431.206 OPM review of SES appraisal systems.

431.207 Performance management plans.

Subpart C—Implementation

431.301 Implementation of this part.

Authority: 5 U.S.C. 43 Subchapter II.

Subpart A—Statutory Authority

§ 431.101 General.

Chapter 43 of title 5, United States Code (5 U.S.C. 4311–4315) provides for the establishment of Senior Executive Service performance appraisal systems and appraisals of senior executives' (as defined in 5 U.S.C. 3132(a)) performance. This part contains the regulations which the Office of Personnel Management has prescribed for performance appraisal in the Senior Executive Service, and supplements the provisions of 5 U.S.C. 4311–4315.

Subpart B—Regulatory Requirements of the Office of Personnel Management

§ 431.201 Purpose.

It is the purpose of this subpart to ensure that performance appraisal

systems are used as a tool for executing basic performance management responsibilities by:

- (a) Communicating and clarifying organizational goals and objectives.
- (b) Identifying individual accountability for the accomplishment of agency goals and objectives.
- (c) Evaluating and improving individual and organizational accomplishments, and
- (d) Using appraisals as a basis for pay and other personnel actions.

§ 431.202 Coverage.

(a) All senior executives covered by subchapter II of Chapter 31 of title 5, United States Code are covered by this part.

(b) 5 U.S.C. 3132(a)(1) identifies agencies covered by this part.

§ 431.203 Definitions.

In this part, terms are defined as follows—

Appointing authority means the agency or department head.

Appraisal period means the period of time established by an appraisal system for which the senior executive's performance will be reviewed and for which a performance appraisal will be given.

Appraisal system means a performance appraisal system established by an agency or component of an agency under subchapter II of chapter 43 of title 5, and Subpart B of this part which provides for establishment of performance standards, identification of critical elements, communication of standards and critical elements to senior executives, establishment of methods and procedures to appraise performance against established methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

Critical element means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that acceptable performance on the element is necessary for acceptable performance in the position.

Final rating means the rating assigned by an appointing authority after considering the recommendations of a Performance Review Board.

Initial rating means the rating by the senior executive's immediate supervisor, the rating official.

Non-critical element means a component of an employee's job which does not meet the definition of a critical

element, but is of sufficient importance to warrant appraisal and the assignment of an element rating. Non-critical elements may not be used in deriving a summary rating.

Performance means the senior executive's accomplishment of assigned duties and responsibilities as specified in the critical elements of the executive's position.

Performance appraisal means the act or process of reviewing and evaluating the performance of an executive against the described performance standards for the appraisal period in order to arrive at ratings for individual critical elements and a summary rating for overall performance.

Performance Plan means the aggregation of the senior executive's critical elements and described performance standards.

Performance Rating means the outcome of the appraisal of each critical element and overall performance expressed as one of five descriptive levels: "Outstanding," "Exceeds Fully Successful," "Fully Successful," "Minimally Satisfactory," and "Unsatisfactory."

Performance requirement means performance standard.

Performance standard means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, cost efficiency, timeliness, and manner of performance.

§ 431.204 The performance appraisal process.

(a) As required by 5 U.S.C. 4312(a), each agency shall establish one or more appraisal systems for appraising the individual and organizational work performance of senior executive during an appraisal period.

(b) Critical elements and non-critical elements may be included in Individual Performance Plans. An executive must be appraised and rated on each critical element of the executive's position. An executive must also be given a summary rating of overall performance. An executive who is given an Unacceptable rating on one critical element must be assigned a summary rating of Unacceptable. Non-critical elements may not be used to derive summary ratings. Agency appraisal systems may not provide for appraisal of subelements.

(c) Agency appraisal systems shall provide for five rating levels for each critical element and five summary rating levels. The required critical element and summary rating levels are

"Outstanding," "Exceeds Fully Successful," "Fully Successful," "Minimally Satisfactory," and "Unsatisfactory". The requirement for five rating levels does not apply to non-critical elements. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level.

(d) For critical elements, performance standards must be written at the "Fully Successful" level, at the "Exceeds Fully Successful" or "Outstanding" level, and at the "Minimally Satisfactory" or "Unsatisfactory" level. For non-critical elements, performance standards must be written at the "Fully Successfully" level. Agencies wishing to rate more than one level above or below the Fully Successful level must write additional standards to conform with the multiple standards requirement.

(e) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as the requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards. However, agencies must provide for higher level management of the performance appraisal process in the interest of employee equity and in order to reflect organizational performance.

(f) Definitions of the five required rating levels follow. Performance standards and agency procedures for deriving summary ratings must be consistent with these definitions.

(1) "Outstanding" means performance of rare very high quality. An Outstanding performer produces an exceptional quantity of work significantly ahead of established schedules or deadlines and with very little supervision.

(2) "Exceeds Fully Successful" means performance of unusually good or excellent quality. The employee produces a very high quantity of work ahead of established schedules or deadlines and with less than normal supervision.

(3) "Fully Successful" means performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work.

(4) "Minimally Satisfactory" means performance which does not consistently meet job expectations and requirements for the "Fully Successful" level. This may be evidenced by the need for close supervisory review, discussion and correction of work products. When performance falls below "Fully Successful," it may be necessary to take remedial action.

(5) "Unsatisfactory" means performance of an employee which fails to meet established performance standards in one or more critical elements of the executive's position. Where performance is "Unsatisfactory," corrective action must be taken.

(g) 5 U.S.C. 4312(b) requires that each appraisal system provide for establishing performance standards based on the requirements of senior executives' positions, communicating the critical elements and performance standards of the position on or before the beginning of each appraisal period, and appraising senior executives based on a comparison of performance with the standards established for the appraisal period. An agency shall establish performance standards in consultation with the senior executive.

(h) Critical elements, non-critical elements, and performance standards must be related to the senior executive's assigned work and organizational performance requirements.

(i) Senior executives shall be rated on at least an annual basis. Agency appraisal systems shall establish a minimum appraisal period of not less than 90 calendar days.

(j) Agencies shall provide to senior executives a copy of the following documents at the time they are prepared: The initial rating; notification of the right to respond in writing before rating becomes final; and any recommended changes by any higher level executive review. Agencies must also provide a copy of critical elements, non-critical elements, and performance standards to each senior executive.

(k) Critical elements, non-critical elements, and performance standards shall be in writing and shall be reviewed and approved by an executive at a higher level than the appraising official or by a review committee. When elements and standards are written by the agency head, no further review is possible.

(l) Agencies shall provide written critical elements and performance standards to senior executives on or before the beginning of a detail or temporary assignment within the same agency when the detail or temporary assignment is expected to last longer than the minimum appraisal period established by the agency. Performance ratings must be prepared for these details and temporary assignments and must be considered in deriving a senior executive's summary rating for the appraisal period.

(m) When a senior executive is detailed or temporarily assigned outside the agency, the agency shall obtain relevant appraisal information from the

agency or organization to which the executive is detailed or temporarily assigned.

(n) Agency performance appraisal systems must provide an opportunity for senior executives to respond in writing to an initial rating and have the rating reviewed by an employee in a higher executive level than the supervisor before review by the Performance Review Board (PRB).

(1) Agency performance appraisal systems may provide for a mandatory second level review.

(2) A senior executive is entitled to only one higher level review unless the agency provides otherwise.

(3) The official making the higher level review may present the findings of the review and make written recommendations to the PRB.

(4) Agencies shall provide copies of the reviewer's comments and recommendations to the senior executive, the supervisory official and the PRB.

(o) As required by 5 U.S.C. 4314(c), each agency is required to establish one or more PRB's to make recommendations to the appointing authority on the performance of senior executives in the agency.

(1) Each PRB in an agency shall have three or more members appointed by the head of the agency or by another official or group acting on behalf of the head of the agency.

(2) Notice of appointment to the PRB must be published in the Federal Register.

(3) The members of the PRB must be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal.

(4) When appraising a career appointee more than one-half of the membership of the PRB must be SES career appointees unless OPM waives this requirement.

(5) Each PRB will review and evaluate the initial rating, the senior executive's written response, if any, and the written comments, if any, on the initial rating by a higher level executive, and will conduct such further review as the PRB finds necessary.

(6) Individual PRB members must not take part in any PRB deliberations or appraisals involving themselves.

(7) The PRB must make a written recommendation concerning the senior executive's summary rating. When the PRB recommendations disagree with the initial rating, the PRB recommendations must be supported by a written justification.

(p) Agencies are required to retain all documentation on performance

appraisal decisions for no less than five years from the date of the appraisal.

(q) Final performance appraisals shall be used to provide a basis for making decisions to:

(1) Remove senior executives from the SES;

(2) Reassign or transfer senior executives within the SES;

(3) Grant performance awards to career senior executives.

§ 431.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and senior executives on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 431.206 OPM review of SES appraisal systems.

(a) SES performance appraisal systems must conform to requirements of law and OPM regulations. The Office of Personnel Management will review appraisal systems for conformance with these regulations as well as with respect to their contribution to agency effectiveness and efficiency and appropriate use of performance information in personnel decisions.

(b) Agencies must submit revised SES performance appraisal plans required under 5 U.S.C. 4312 to the Office of Personnel Management for review and approval. Submissions may be either agency-wide appraisal systems or requirements which the systems of subordinate organizations must meet.

(c) Proposed changes to approved SES performance appraisal plans which have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

(d) If the Office of Personnel Management determines that an appraisal system does not meet the requirements of Subchapter II of Chapter 43 of title 5, United States Code or of this part, it shall direct the agency to implement and appropriate system or to correct operations under the system. The agency shall take any action so required.

§ 431.207 Performance management plans.

(a) Agencies must submit proposed Performance Management Plans to the Office of Personnel Management for review and approval as required by 5 CFR 430.207.

(b) Proposed changes to approved Performance Management Plans which

have an impact on how an agency meets legal or regulatory requirements must be submitted to the Office of Personnel Management for review and approval.

Subpart C—Implementation

§ 431.301 Implementation of this part.

(a) Each agency covered by subparts A and B of this part or by 5 CFR Part 540 shall submit Performance Management Plans to the Office of Personnel Management for review within 120 days after (final publication of these regulations).

(b) Agencies will be required to implement the provisions of an approved Performance Management Plan not later than (180 days after final publication of these regulations).

(c) Decisions based on performance appraisals under the agency's Performance Management Plan must begin as soon as possible but no later than the first day of the first applicable pay period which begins on or after October 1, 1984.

5. In Part 451, the heading is revised, Subpart A is revoked and reserved, and Subpart B is revised to read as follows:

PART 451—SPECIAL AWARDS

Subpart A—(Reserved)

Subpart B—Regulatory Requirements of the Office of Personnel Management

Sec.

- 451.201 Applicability.
 - 451.202 Purpose.
 - 451.203 Coverage.
 - 451.204 Definitions.
 - 451.205 Policy.
 - 451.206 Eligibility.
 - 451.207 Payment.
 - 451.208 Responsibilities of the Office of Personnel Management.
 - 451.209 Agency responsibilities.
- Authority: 5 U.S.C. 4506 and 5406.

Subpart A—(Reserved)

Subpart B—Regulatory Requirements of the Office of Personnel Management

§ 451.201 Applicability.

(a) This subpart contains the regulatory requirements of the Office of Personnel Management for the establishment and conduct of the Special Awards Program for employee suggestions, inventions, and meritorious actions which are not included in or measured by performance standards. These accomplishments and contributions are beyond or outside the scope of assigned job responsibilities and performance standards.

(b) An award under this part, based on employee accomplishments that are

clearly beyond assigned job responsibilities and performance standards, as determined by the agency head, shall be in addition to a performance award granted under 5 CFR Part 531, Subpart F.

(c) Refer to 5 CFR, Part 531, Subpart F, for the regulatory requirements on Performance Awards based on assigned duties and contributions within the scope of the employee's job responsibilities and performance standards.

§ 451.202 Purpose.

(a) The Government Employees' Special Awards Program is designed to improve Government operations and services. Its purpose is to motivate employees to increase productivity and creativity by rewarding those whose accomplishments and adopted ideas benefit the Government and which are clearly beyond or outside assigned job responsibilities and performance standards.

(b) The Office of Personnel Management encourages agencies to make maximum use of their authorities under Chapters 45 and 54 of title 5, United States Code, to establish and administer special awards for suggestions, inventions, and meritorious actions that best support and enhance agency and national goals, and meet employee recognition needs.

§ 451.203 Coverage.

(a) This subpart applies to employees as defined by section 2105 of title 5, United States Code.

(b) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

§ 451.204 Definitions.

In this part, terms are defined as follows:

Intangible benefits means benefits which cannot be measured such as contributions which improve science, medicine, natural resources, or services to the public.

Presidential award means an award granted by the President under section 4504 of title 5, United States Code.

Special award or "award" means a monetary, an honorary, or a non-monetary award.

Tangible savings means benefits or savings which can be measured such as conserving staff, material, time or space, eliminating unnecessary processes or improving existing methods.

§ 451.205 Policy.

(a) A special award under this part shall be:

(1) Monetary; honorary, or non-monetary;

(2) Based on employee accomplishments that are clearly beyond or outside assigned job responsibilities and performance standards; and

(3) Based on the tangible and intangible savings and/or benefits to the Government.

(b) Monetary awards based on tangible savings shall not exceed amounts indicated by the following scales:

(1) Awards of up to \$10,000, based on tangible savings:

Tangible savings	Award
Up to \$20,000	5 percent of savings
\$20,001 to \$100,000	\$1,000 plus 1.5 percent of savings over \$20,000
Over \$100,000	\$2,200 plus .25 percent of savings over \$100,000 up to maximum award of \$10,000.

(2) Awards over \$10,000 based on tangible savings:

Savings (in millions)	One time	Award
Savings will continue for 5 years or more. First year savings will be:		
5 to 7.4	15	\$15,000
7.5 to 9.9	20	\$20,000
10	25	\$25,000

(3) Presidential Awards based on tangible savings:

Savings (in millions)	One time	Award
Savings will continue for 5 years or more. First year savings will be:		
20 or more	75	\$10,000 in addition to the \$25,000, for a total of \$35,000.

(c) In addition to special awards based on tangible savings under paragraphs (b) (1), (2) and (3) of this section, special awards may be granted for contributions having intangible benefits to the Government. OPM shall provide guidance to agencies on how to compute all monetary awards based on intangible benefits.

(d) OPM shall provide guidance to agencies regarding criteria for granting all honorary and non-monetary awards based on tangible savings and intangible benefits, including honorary Presidential awards.

§ 451.206 Eligibility.

(a) A special award may be granted when the suggestion, invention, meritorious action or other personal or group effort:

(1) Is clearly beyond or outside assigned job responsibilities and performance standards, except for special one-time accomplishment awards;

(2) Benefits the Government as described in 5 U.S.C. 4503 and 4504;

(3) Was made while the contributor was a Government employee;

(4) Has been described in writing, and

(5) Has been approved by the benefiting organization at a management level higher than the individual who

(i) Made the contribution;

(ii) Recommended use of the suggestion, invention, or meritorious action; or

(iii) Recommended the award.

(b) Special awards shall not be mandatory.

§ 451.207 Payment.

(a) Awards paid under this part do not increase the rate of basic pay, and are subject to the withholding of income taxes.

(b) When a special award is approved for an employee of another agency, arrangements shall be made to transfer funds to the employing agency. If the administrative costs of transferring funds would exceed the amount of the award, the employing agency shall absorb the award costs. The Official Personnel Folder shall be documented to reflect the nature and amount of Special Awards.

§ 451.208 Responsibility of the Office of Personnel Management.

(a) OPM shall review, and following verification of savings or benefits and relationship of contributions to job requirements, approve or disapprove recommendations for all awards in excess of \$10,000 on a case-by-case basis. OPM shall limit approval of awards to denominations of \$15,000, \$20,000 and \$25,000.

(b) The Director, OPM, shall advise the President on monetary and honorary Presidential awards for Government employees. A monetary Presidential award granted in addition to an award made under 5 U.S.C. 4503 shall be for \$10,000.

§ 451.209 Agency responsibilities.

(a) The head of each agency shall establish an agency Special Awards Program that seeks to gain maximum benefits for the Government through improved employee motivation and productivity by providing for:

(1) The integrity of the program by reviewing agency program results to assure that special awards are granted equitably, on the basis of the tangible

savings and/or intangible benefits to the Government; that action is taken to grant special awards in a timely manner; and that information is made available concerning persons who have received special awards and the reason(s) why each award is granted; and

(2) The greatest motivational impact by allocating an adequate budget and staffing support services to assure prompt action on special award recommendations, and effective promotion and publicity activities.

(b) Each agency head may delegate the responsibilities in paragraph 451.209(a) of this part as deemed appropriate for his or her organization.

(c) The head of each agency shall transmit to OPM:

(1) Award recommendations over \$10,000;

(2) All recommendations for Presidential awards; and

(3) An annual report on program activities for the past fiscal year.

(d) Each agency shall establish and operate an up-to-date program which shall provide for:

(1) Delegation of authority and responsibility for approval of special awards to the lowest level consistent with sound management practices;

(2) Special award recommendations involving the minimum amount of paperwork and processing which shows that criteria are met and expenditure of appropriated funds for the award is justified.

(3) Central administration and review of the agency-wide program, including systematic evaluation, planning, and feedback reports to employees;

(4) Time limits for processing special award recommendations and granting of special awards; and

(5) Consideration of accomplishments and adopted ideas for wider application both within the agency and Governmentwide, and prompt referral when appropriate.

6. The heading for Part 531 and the authority citation for Part 531, Subpart D, are revised to read as follows:

PART 531—PERFORMANCE BASED INCENTIVE SYSTEM FOR THE GENERAL SCHEDULE

Subpart D—Within-Grade Increases

Authority: 5 U.S.C. 5301, 5335, and 5338 and E.O. 11721 as amended, section 402, unless otherwise noted.

7. Section 531.401 is revised to read as follows:

§ 531.401 Principal authorities.

The following are the principal authorities for the regulations in this subpart:

(a) 5 U.S.C. 2301(b)(3) provides in part that "... appropriate incentives and recognition should be provided for excellence in performance."

(b) 5 U.S.C. 5301(a)(2) provides that "pay distinctions be maintained in keeping with work and performance distinctions."

(c) Section 402 of E.O. 11721, as amended, provides that "The Civil Service Commission (Office of Personnel Management) shall issue such regulations and standards as may be necessary to ensure that only those employees whose work is of an acceptable level of competence receive periodic step-increases under the provisions of section 5335 of title 5, United States Code."

8. Section 531.403 is amended by revising the term "acceptable level of competence," to read as follows:

§ 531.403 Definitions.

In this subpart:

Acceptable level of competence means a level at which the performance by an employee of the duties and responsibilities of his or her assigned position warrants advancement of the employee's rate of basic pay to the next higher step of the grade of his or her position, subject to the requirements of § 531.404 of this subpart.

9. Section 531.404 is revised to read as follows:

§ 531.404 Earning within-grade increase.

An employee paid at less than step 10 of the grade of his or her position shall only earn advancement in pay to the next higher step of that grade upon meeting the three requirements established by law:

(a) To earn a within-grade increase, the employee's performance of assigned work must be at an acceptable level of competence, as defined in this subpart by authority of Section 402 of E.O. 11721, as amended.

(1) Acceptable level of competence for an employee in steps 1 through 6 of the grade of his or her position means a level of performance of assigned work of at least "Fully Successful," as defined in Part 430 of this chapter, for each critical element. In addition, the employee's summary performance rating must be at least "Fully Successful."

(2) Acceptable level of competence for an employee in steps 7 through 9 of the grade of his or her position means a level of performance of assigned work of

at least "Fully Successful," as defined in Part 430 of this chapter, for each critical element and, in addition, the employee's summary performance rating must be at least "Exceeds Fully Successful."

(b) The employee must have completed the required waiting period for advancement to the next higher step of the grade of his or her position; and

(c) The employee must not have received an equivalent increase during the waiting period.

10. Section 531.408 (b) and (c) are revised to read as follows:

§ 531.408 Communication of performance requirements.

(b) Employees covered by an appraisal system established under § 430.204 of this chapter shall be informed of the specific performance requirements that constitute an acceptable level of competence within the time frame and by the means of communication of performance standards established under § 430.204 of this chapter.

(c) Employees not covered by an appraisal system established under § 430.204 of this chapter shall be informed, under procedures established by the head of the agency, of the specific requirements for performance at an acceptable level of competence within a reasonable time after initial appointment or permanent change in position.

11. In § 531.409, paragraphs (b), (c) and (d) are revised to read as follows:

§ 531.409 Acceptable level of competence determinations.

(b) *Basis for determination.* An acceptable level of competence determination shall be based on a current performance rating made under Part 430 of this chapter, or for those agencies not covered by Chapter 43 of title 5, United States Code, minimal performance appraisal requirements issued by OPM. If an employee has been reduced in grade due to "Unacceptable" performance and has served in one position at the lower grade for at least the minimum appraisal period established by the agency, a performance rating at the lower grade shall be used as the basis for an acceptable level of competence determination.

(c) *Delay in determination.* An acceptable level of competence determination must be delayed when:

(1) An employee has not had the minimum period of time established by the agency to demonstrate acceptable performance because he or she has not

been informed of the specific requirements for performance at an acceptable level of competence in his or her current position; and

(2) The employee has not otherwise been rated within 90 days before the end of the waiting period.

When an acceptable level of competence determination has been delayed under this subpart, the employee shall be informed that his or her determination is postponed and of the specific requirements for performance at an acceptable level of competence. The determination shall be based on a performance rating completed at the end of the minimum appraisal period established by the agency performance appraisal plan.

(d) *Waiver of requirement for determination.* An acceptable level of competence determination shall be waived and a within-grade increase granted when an employee has not served in any position for the minimum appraisal period under an applicable agency performance appraisal system during the final 52 calendar weeks of the waiting period for one or more of the following reasons:

(1) Absences that are creditable service in the computation of a waiting period or periods under § 531.406 of this subpart;

(2) Because of paid leave;

(3) Because the employee received service credit under the back pay provisions of subpart H of Part 550 of this chapter;

(4) Because of details to another agency or employer;

(5) Because of long term training; or

(6) Because the employee has recently transferred from another agency.

In such a situation, there shall be a presumption that the employee would have performed at an acceptable level of competence had the employee performed the duties of his or her position of record for the minimum appraisal period under the applicable agency performance appraisal system.

12. Section 531.411 is revised to read as follows:

§ 531.411 Continuing evaluation after withholding a within-grade increase.

After a within-grade increase has been withheld, an agency may grant the within-grade increase at any time after it determines that the employee has demonstrated sustained performance at an acceptable level of competence. However, the agency shall determine whether the employee's performance is at an acceptable level of competence after no more than 52 calendar weeks

following the original eligibility date for the within-grade increase.

13. In Subpart E, §§ 531.503 and 531.504 are revised to read as follows:

Subpart E—Quality Step Increases

§ 531.503 Purpose of quality step increases.

The purpose of quality step increases is to recognize outstanding performance by granting faster than normal step increases.

§ 531.504 Level of performance required for quality step increase.

(a) A quality step increase may only be granted to an employee who receives a summary performance rating of "Outstanding," as defined in Part 430 of this chapter.

(b) An agency shall award a quality step increase to an employee in steps 1 through 3 of each General Schedule grade whose current summary performance rating is "Outstanding," as defined in Part 430 of this chapter.

(c) An agency may award a quality step increase to an employee in steps 4 through 9 of the General Schedule whose current summary performance rating is "Outstanding," as defined in Part 430 of this chapter. An agency may not make such awards mandatory.

14. Section 531.505 is revoked and removed. Sections 531.506 through 531.508 are redesignated as §§ 531.505 through 531.507, and revised to read as follows:

§ 531.505 Restrictions on granting quality step increases.

As provided by 5 U.S.C. 5336, a quality step increase may not be granted to an employee who has received a quality step increase within the preceding 52 consecutive calendar weeks.

§ 531.506 Effective date of quality step increase

Quality step increases shall be effective as soon as possible after annual performance appraisals are approved.

§ 531.507 Agency plans for granting quality step increases.

Each agency shall include a plan for granting quality step increases, as required by 5 CFR 430.207(a)(4), in the agency's Performance Management Plan required under Part 430 of this chapter. The plan shall:

(a) Be as simple as practicable;

(b) Provide for delegation of authority to grant quality step increases to the lowest practicable level of management.

(c) Be reviewed and approved in accordance with § 430.207 of this chapter;

(d) Provide for informing employees, at least annually, of the number of quality step increases granted in the agency by grade level.

15. Section 531.509 is redesignated § 531.508.

16. In Part 531, a new Subpart F is added to read as follows:

Subpart F—Performance Awards

- Sec.
- 531.601 Applicability.
 - 531.602 Purpose of performance awards.
 - 531.603 Coverage.
 - 531.604 Definitions.
 - 531.605 Policy.
 - 531.606 Eligibility.
 - 531.607 Payment.
 - 531.608 responsibilities of the Office of Personnel Management.
 - 531.609 Agency responsibilities.

Authority: 5 U.S.C. 4302(a)(3), 4506, and 5405.

Subpart F—Performance Awards

§ 531.601 Applicability.

(a) This subpart contains the Office of Personnel Management's regulatory requirements for establishment and conduct of the performance awards component of the Performance Management System, under the authority of title 5, United States Code, Chapters 43, 45, and 54.

(b) An award under this subpart shall be supported by the employee's performance rating and based on accomplishments and contributions which are within the scope of the employee's assigned job responsibilities and performance standards. The Official Personnel Folder shall be documented to reflect the nature and amount of performance awards.

(c) Refer to 5 CFR Part 451 for the regulatory requirements for granting awards to employees for accomplishments not included in or measured by performance standards because they are beyond the scope of job responsibilities and performance standards.

§ 531.602 Purpose of performance awards.

(a) The purpose of performance awards is to recognize, reward, and motivate employees who attain high levels of performance.

(b) The Office of Personnel Management encourages agencies to make maximum use of their authorities under Chapters 43, 45, and 54 of title 5, United States Code, to establish and administer performance awards that

best support and enhance agency and national goals and meet employee recognition needs.

§ 531.603 Coverage.

(a) This subpart applies to employees as defined by Section 2105, title 5, United States Code, except for those in the Senior Executive Service.

(b) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

§ 531.604 Definitions.

In this part, terms are defined as follows:

Performance award or award means a monetary, honorary, or non-monetary award.

Plan means a written statement submitted by the head of the agency and approved by OPM implementing law and regulation for the performance awards component of the overall Performance Management Plan as described in 5 CFR 430.207.

Presidential award means an award granted by the President under Section 4504 of title 5, United States Code.

§ 531.605 Policy.

A performance award under this subpart shall be:

(a) Monetary, honorary, or non-monetary;

(b) Based on employee accomplishments and contributions which are within the scope of an employee's assigned job responsibilities and performance standards; and

(c) Based on a percentage of the employee's base pay, up to maximum of 15 percent. However, if the sum of the performance award recommended and any within-grade or quality step increase received by the employees exceeds 15 percent, the award shall be reduced to that maximum.

§ 531.606 Eligibility.

(a) A performance award may be granted to individuals when superior accomplishments or other contributions:

(1) Are within the scope of the employee's assigned job responsibilities and performance standards;

(2) Benefit the Government as described in 5 U.S.C. 4503 and 4504;

(3) Were made while the contributor was a Government employee;

(4) Have been supported by a performance rating of Exceeds Fully Successful on one or more elements of a job or a summary performance rating of at least Exceeds Fully Successful.

(5) Have been approved at a management level higher than the official who recommended the performance awards.

(b) Performance awards shall not be mandatory.

§ 531.607 Payment.

Awards paid under this Subpart do not increase the rate of basic pay and are subject to the withholding of income taxes.

§ 531.608 Responsibilities of the Office of Personnel Management.

(a) The Director, Office of Personnel Management, shall advise the President on Presidential awards for Government employees, and issue instructions to agencies on how to nominate employees for Presidential awards.

(b) Funds for specific agency productivity programs are determined by each agency head and shall not be a part of performance award funds.

(c) OPM shall provide guidance to agencies regarding honorary and non-monetary awards, including honorary Presidential awards.

§ 531.609 Agency responsibilities.

(a) The head of each agency shall establish a performance awards component of the Performance Management System that seeks to gain maximum benefits for the Government through improved employee motivation by providing for:

(1) The integrity of the Performance Management System by reviewing agency results to assure that awards are granted on the basis of merit; that performance awards are used to recognize, reward, and motivate employees; that action is taken to grant awards in a timely manner; and that information is made available concerning persons who have received performance awards and the reason(s) why each award is granted; and

(2) The greatest motivational impact by allocating an adequate budget, staffing and support services to assure prompt action on all employee performance award recommendations and effective promotion and publicity activities.

(b) Each agency head may delegate the responsibilities in paragraph 531.609(a) of this subpart, as deemed appropriate for his or her organization.

(c) The head of each agency shall transmit to OPM:

(1) Award recommendations over \$10,000;

(2) All recommendations for Presidential awards;

(3) A Performance Management Plan which includes a performance awards component, and proposed plan revisions for review and approval; and

(4) An annual report on performance awards activities for the past fiscal year.

(d) The performance awards component of the Performance Management System Plan to be submitted to OPM shall include the following provisions:

(1) Delegation of authority and responsibility for approval of monetary, honorary and non-monetary performance awards to the lowest level consistent with sound management practices;

(2) Performance award recommendations to involve the minimum amount of paperwork and processing which shows that criteria are met and that expenditure of appropriate funds for the award is justified.

(3) Use of the agency's performance appraisal rating as the basis for granting monetary, honorary, and non-monetary performance awards based on superior accomplishments within the scope of the employee's assigned job responsibilities and performance standards. Agency productivity programs, which are separate from performance awards, will provide for the granting of separate productivity awards.

(4) Granting of performance awards as soon as possible after performance appraisals are approved or as soon as possible after an assessment of performance indicates that an award should be granted.

(5) Consideration of special achievements and other contributions for wider application both within the agency and Governmentwide, and prompt referral when appropriate.

17. In Part 532, a new Subpart H is added, to read as follows:

PART 532—PREVAILING RATE SYSTEMS

Subpart H—Performance and Special Awards

Sec.
532.801 General.

Authority: 5 U.S.C. 5343, 5346.

Subpart H—Performance and Special Awards

§ 532.801 General.

(a) Performance awards for prevailing rate employees are covered under the provisions of subpart F of Part 531 of this chapter except for the provisions of § 531.608(b) of this part.

(b) Awards for employee accomplishments beyond normal job responsibilities and performance standards are covered under Part 451 of this chapter.

18. Part 540 is revised to read as follows:

PART 540—MERIT PAY SYSTEM

Sec.
540.101 General.
540.102 Definitions.
540.103 Ranges of basic pay and employee coverage.
540.104 Determination and allocation of merit pay funds.
540.105 Merit pay performance appraisals.
540.106 Merit pay determinations.
540.107 Merit pay increases and salary levels.
540.108 Special provisions for merit pay increases.
540.109 Cash award program.
540.110 Agency plans for merit pay system.
540.111 Reports.

Authority: 5 U.S.C. Chapters 43 and 54.

§ 540.101 General.

Chapter 54 of title 5, United States Code (5 U.S.C. 5401–5405), provides for a Merit Pay System to recognize and reward quality performance by supervisors and management officials (as defined in 5 U.S.C. 7103(a)(10)–(a)(11) in positions classified in GS–13, 14, or 15. This part contains the regulations which the Office of Personnel Management has prescribed for the Merit Pay System, and supplements the provisions of 5 U.S.C. 4302, 4304, and 5401–5405.

§ 540.102 Definitions.

In this part:
Agency has the meaning given it in 5 U.S.C. 5102.

Employee means a supervisor or management official to whom chapter 54 of title 5 U.S.C. applies.

Management official has the meaning given that term in 5 U.S.C. 7103(a)(11); i.e., "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency."

Merit pay determination is the decision as to the amount of the merit pay increase (including a zero amount).

Merit pay fund means the amount of agency money to be allocated to merit pay increases, as determined through application of appropriate Merit Pay Fund Computation Tables.

Merit pay increase means the increase in basic pay for a merit pay employee in excess of that granted automatically under 5 U.S.C. 5402 (c)(1) or (c)(3).

Merit pay pool means that portion of an agency identified by agency management as having an optimum number of merit pay positions to facilitate internal management of its

merit pay plan and to which funds are allocated for distribution as merit increases to covered employees.

Supervisor has the meaning given that term in 5 U.S.C. 7103(a)(10); i.e., "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority."

§ 540.103 Ranges of basic pay and employee coverage.

(a) Under 5 U.S.C. 5402(a), the Office of Personnel Management is required to establish a Merit Pay System which provides a range of basic pay for each grade of the Merit Pay System. The Merit Pay System shall consist of three grades, as follows:

(1) GM–13, which shall consist of supervisors and management officials who are in positions classified in grade GS–13;

(2) GM–14, which shall consist of supervisors and management officials who are in positions classified in grade GS–14; and

(3) GM–15, which shall consist of supervisors and management officials who are in positions classified in grade GS–15.

(b) The range of annual rates of basic pay for each grade of the Merit Pay System shall be the same as the range of annual rates of basic pay for the corresponding grade of the General Schedule. Higher ranges of rates of basic pay authorized under 5 U.S.C. 5303 shall be applicable under this part to any position covered by such authorization.

(c) In accordance with the definitions in 5 U.S.C. 7103 (a)(10) and (a)(11), the head of each agency shall identify employees who are supervisors or management officials for purposes of coverage under the Merit Pay System.

§ 540.104 Determination and allocation of merit pay funds.

(a) Under 5 U.S.C. 5402(b)(4), the Office of Personnel Management must determine the funds available for merit pay purposes. Each agency covered by the Merit Pay System shall submit such

information as OPM may require for this purpose.

(b) The Office of Personnel Management shall issue annual Merit Pay Fund Computation Tables consistent with the annual increase made to the General Schedule at these grade levels and shall provide instructions for their use. Each agency covered by the Merit Pay System shall use these tables to determine the size of the merit pay fund available to the agency.

(c) Each agency covered by the Merit Pay System shall have one or more merit pay pools. If there is more than one pool, agencies may determine the funds available to each pool by the same method that is used to compute the merit pay fund, or they may make adjustments to that method to recognize organizational accomplishment or unusual distributions of performance within a pool, or to satisfy the requirements of paragraph (d)(2) of this section. If other than the computation table amount is to be allocated, the method must be approved by OPM for inclusion in the agency's merit pay plan and must be fully documented.

(d) Each agency covered by the Merit Pay System is required to establish procedures to ensure:

(1) That the sum of merit pay increases awarded each year under § 540.107 of this part to Merit Pay System employees in the agency is no less than 95 percent and no more than 105 percent of the agency's merit pay fund (unless the Office of Personnel Management has granted prior approval for a lesser or greater obligation); and

(2) That no portion of the contribution to the merit pay fund made for employees to whom no immediate merit pay increase may be paid, because of the statutory pay ceiling imposed by 5 U.S.C. 5308 or by appropriations limitations on pay, is used to pay such increases for employees not subject to the statutory pay ceilings.

§ 540.105 Merit pay performance appraisals.

(a) Except as provided in paragraph (c) of this section each merit pay determination shall be based on a current appraisal of performance which is to be made under a performance appraisal system that has been approved by the Office of Personnel Management under 5 U.S.C. 4304(b)(1).

(b) The performance appraisal period on which the merit pay determination is based should be as close to the merit pay determination as the agency deems practicable, but, in no event, will end earlier than June 30 nor later than November 30 of the same year.

(c) Agencies and employees subject to the Merit Pay System, but not covered by Chapter 43 of Title 5, United States Code, shall meet minimal performance appraisal requirements issued by the Office of Personnel Management.

§ 540.106 Merit pay determinations.

(a) Each agency shall establish a procedure for determining in a fair and objective manner the amount of merit pay increase that shall be granted each Merit Pay System employee. The determination is to be made for each employee covered by the System on the closest date to the effective date for merit pay increases that is determined by the agency to be administratively feasible and is to be based on a current performance appraisal.

(b) Each merit pay determination shall take into consideration, in addition to the employee's performance, the period of time since the employee's last increase in rate of basic pay, and the amount of the last increase in rate of basic pay.

(c) If the agency determines it is appropriate to do so, a merit pay determination may also take into consideration the accomplishments of the employee's organization.

(d) Each agency shall establish procedure to manage the performance appraisal process and merit pay determinations for employees covered by the Merit Pay System so as to obtain equitable and appropriately sized merit pay increases.

(e) Agency procedures for making merit pay determinations must include a requirement for an approval of each merit pay determination by an official of the agency who is at a higher level than the official who made the merit pay determination (unless there is no official at a higher level in the agency), and also by the official with responsibility for managing the merit pay pool, if different.

(f) The reasons for each merit pay determination are to be documented and shall be made available to the affected employee at his or her request.

(g) The requirement that the merit pay determination be based on performance shall be waived when an employee's performance cannot be appraised for the minimum period of time established by the agency for coverage under its performance appraisal system. When the merit pay determination is waived, pay is to be set in accordance with § 540.108 of this part.

§ 540.107 Merit pay increases and salary levels.

(a) Merit pay increases under 5 U.S.C. 5402(b)(1) are to be made effective on the same day as the automatic pay adjustments under 5 U.S.C. 5402 (c)(1) and (c)(3). In the event that the amount of the merit increases cannot be determined in a timely manner, the increases shall be made retroactive to the effective date of the pay adjustments. In no event shall the retroactive payment be made later than December 31 of the calendar year during which such pay adjustment takes effect.

(b) In accordance with the requirements of 5 U.S.C. 5402(a)—

(1) Each Merit Pay System employee's rate of basic pay must be increased, effective on the same day a pay adjustment under 5 U.S.C. 5402(c)(1) becomes effective, by an amount necessary to raise the employee's rate of basic pay to the new minimum rate for the employee's grade; and

(2) No Merit Pay System employee's rate of basic pay may be increased by an amount that would cause that rate of basic pay to exceed the maximum rate for the employee's grade, except as provided in 5 U.S.C. 5334(b) and 5363 in connection with retained pay.

(c) Merit pay increases must be reduced by the amount of any adjustment required under 5 U.S.C. 5402(c)(3) to raise an employee's pay to a new range minimum amount, up to and including the full amount of the merit increase granted under 5 U.S.C. 5402(b)(1).

(d) Agencies must establish procedures to prevent employees in the same merit pay pool and grade level with identical performance ratings from experiencing a reversal in their relative rates of basic pay due solely to the construction of the merit pay allocation model.

§ 540.108 Special provisions for merit pay increases.

(a) An employee for whom the requirement for a performance-based merit pay determination is waived under § 540.106(g) of this part shall be paid the sum of—

(1) The employee's rate of basic pay immediately before the merit pay increase; and

(2) The automatic adjustments required by 5 U.S.C. 5402 (c)(1) and (c)(3) at the time of the merit pay increase; and, except as provided in paragraph (c) of this section,

(3)(i) The average increase received, or, if necessary, a constructed average increase which would have been

received under 5 U.S.C. 5402(b)(1) by comparably situated employees; or

(ii) an increase identified with a predetermined performance level designator for comparably situated employees; or

(iii) The contribution to the merit pay fund in behalf of the employee which is authorized under 5 U.S.C. 5402(b)(4)(B) representing the portion of the annual GS pay increase which the employee was not granted automatically; or

(iv) The amount provided by the appropriate factor of the Merit Pay Fund Computation Table (to include the quality step increase equivalent or not, as determined by the agency).

(b) When an employee is restored or reemployed after an official absence which encompassed the time of one or more pay adjustments provided under 5 U.S.C. 5402 the employee's rate of basic pay shall be set at the sum of:

(1) The employee's rate of basic pay immediately before the interruption of his or her employment with the agency; and

(2) The automatic adjustments that would have been required by 5 U.S.C. 5402 (c)(1) and (c)(3) if the employee's service had not been interrupted; and, except as provided in paragraph (c) of this section:

(3)(i) The average increases received, or, if necessary, constructed average increases which would have been received under 5 U.S.C. 5402(b)(1) by comparably situated employees; or

(ii) Increases identified with a predetermined performance level designator for comparably situated employees; or

(iii) The contributions to the merit pay fund in behalf of the employee which is authorized under 5 U.S.C. 5402(b)(4)(B) representing the portion of the annual GS pay increase which the employee was not granted automatically; or

(iv) The amounts provided by the appropriate factor of the Merit Pay Fund Computation Table (to include the quality step increase equivalent or not, as determined by the agency).

(c)(1) When the requirement for a performance-based merit pay determination is waived or when the employee's pay is being set because of:

(i) Service in the armed forces or non-Government service as referenced in 5 U.S.C. 5402(d), or

(ii) Because of other service for which an employee's advancement through the pay range is preserved by statute, or

(iii) Because one or more merit pay increases occurred during a period for

which the employee received credit under the back pay provisions of 5 U.S.C. 5596 and Subpart H of Part 550 of this chapter, the employee's pay shall be set at the sum of:

(2)(i) The employee's rate of basic pay immediately before the merit pay increase or before interruption of his or her duty status, as appropriate; and

(ii) The automatic adjustments that are required or that would have been required by 5 U.S.C. 5402 (c)(1) and (c)(3) if the employee's duty status has not been interrupted; and

(iii) The amounts provided by the appropriate factors of the Merit Pay Fund Computation Tables for the employee for each pertinent year.

(d) Increases granted under paragraphs (a)(3) (i) through (iii) and (b)(3) (i) through (iii) of this section are to be reduced as described in § 540.107(c) of this part.

§ 540.109 Cash award program.

(a) 5 U.S.C. 5403 authorizes a cash award program as part of the Merit Pay System. Each agency covered by the Merit Pay System shall establish a cash award program for its Merit Pay System employees in accordance with the provisions of 5 U.S.C. 5403 and Subpart F of Part 531 of this chapter.

(b) Cash awards that are not related to the Merit Pay System employee's performance in his or her position are to be administered in accordance with the provisions of Part 451 of this chapter and the agency's special award program established pursuant to Part 451.

§ 540.110 Agency plans for Merit Pay System.

(a) Each agency with employees who are subject to the Merit Pay System shall establish a plan for administering the Merit Pay System within that agency. Each agency's plan shall be consistent with the provisions of 5 U.S.C. 5401-5403 and this part, and shall include, in addition to provisions to carry out requirements of this part, provisions for:

(1) Communication to the agency's Merit Pay System employees of the purpose of the Merit Pay System and how it works; and

(2) Training in the operation of the Merit Pay System for employees who are subject to that System and for employees who are responsible for its operation.

(b) Agency pay-out models will provide for a matrix using either percentages or points to determine the merit pay amounts to be granted.

(c) No employee who is rated Fully Successful or higher shall receive a total increase to base pay under 5 U.S.C. 5402 (b)(1), (c)(1), and (c)(3) which is less than the percentage increase authorized under 5 U.S.C. 5305 for General Schedule pay system employees.

(d) No employee who is rated Fully Successful or lower will be granted a merit pay increase which would result in a rate of base pay higher than the equivalent of the step 7 rate of the corresponding GS grade.

(e) Employees who are rated Outstanding will receive the minimum differential or amount of pay increase specified in the OPM approved performance pay plan.

(f)(1) Each agency covered by subparts A and B of Part 430 or by 5 CFR Part 540 shall submit Performance Management Plans, including a Merit Pay System Plan, to the Office of Personnel Management for review within 120 days after (final publication of these regulations).

(2) Agencies will be required to implement the provisions of an approved Performance Management Plan no later than (180 days after final publication of these regulations).

(3) An agency may utilize Performance Appraisal Systems and Merit Pay Systems which have been approved by the Office of Personnel Management until (180 days after final publication of these regulations).

(4) Changes to already approved merit pay plans, except as provided in paragraph (h) of this section must be submitted to OPM at least 60 days before they are scheduled to be effective.

(g) Changes to agency merit pay plans prompted by unanticipated Government-wide merit pay funding levels or other emergency events shall be submitted to the Office of Personnel Management for approval in accordance with special instructions issued by OPM at that time.

§ 540.111 Reports.

So that the Office of Personnel Management can provide the Congress and others with information regarding the operation of the Merit Pay System and the Cash Award Program, each agency shall maintain such records and submit to OPM such reports as OPM may require.

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